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ARCHAISM IN THE LAW OF ALIMONY.

A recent decision of the Appellate Division of the Supreme Court of Ontario has reminded us again that in some cases at least, it is neither just nor equitable that our Courts should be bound by precedents of English law, notwithstanding their age, or the customs and habits of life in vogue at the time the precedent was created. Social conditions change with centuries of time; and while no one with knowledge of the integrity of British Courts of Justice would venture to suggest that our Judges would be influenced in the execution of the duties of their high office either by public or private sentiment, the decisions of any Court must in every case be relative to the prevailing social conditions in so far as such decisions involve social or public problems.

Without discussing or questioning the justice of the decision in question, we can be free to look into the justice of the condition of the law under which our Courts are bound to follow ancient precedent, even though the conditions under which we live today may bear directly on the point at issue and be vastly different from those surrounding the case constituting the precedent.

In this case an action for alimony was brought by a wife against her husband. The claim was based on alleged cruelty and the Courts were called upon to decide as a question of law whether the facts proven at the trial constituted cruelty in the legal sense. The trial Judge held that they did. The Appellate Division held that they did not, basing their decision on a case tried in England in 1790. They quoted at length from the written judgment and applied this finding to a set of conditions that had arisen between husband and wife a century and a quarter

later. The Court held that they were bound to follow this old decision, and in doing so found the acts complained of did not constitute cruelty as defined in 1790, and the wife was held to be not entitled to alimony or any other relief.

The injustice of the whole principle can be expressed in no better language than that of the learned Chief Justice of Ontario: "I reluctantly agree with the disposition of this appeal which is proposed by my brother, Ferguson. I agree with him that we are bound by the authorities to hold that the respondent has not made a case entitling her to alimony; that the law should be as he states it to be in in my opinion to be deplored, and is not in my judgment in accordance with modern views as to the relations between husband and wife. To withhold alimony unless the conduct of the husband is such as to lead to the conclusion that it has impaired, or that it will impair the physical health or the mentality of the wife, is to say that a husband may subject his wife daily and even hourly to such treatment as makes her life a veritable hell upon earth and she is without remedy if she is robust enough to suffer it all without impairment of her physical health or mentality."

English law has undergone a wide development in the last one hundred and thirty years and in no branch has it developed more than in that relating to the rights of married women. A decision scarcely older than the 1790 case goes so far as to say: "The husband both by law power and dominion over his wife, and may keep her by force within the bounds of duty; any may beat her, but not in a violent or cruel manner." Today, such conduct would not only give the wife a good ground for separation with alimony but it would constitute a criminal offence. We have only to go back half a century to find that a married woman could not hold property, make a will, sue to collect a debt or incur a liability, free from her husband; but now by virtue of legislation she enjoys the rights of citizenship possessed by male subjects, even to the franchise.

Yet with all this development the Legislature has not yet conferred on the married woman the right to have the

vows of the marriage contract enforced in their true spirit.

It is not fair to compare the marriage contract with an ordinary mercantile contract. The Courts have quite rightly refrained from releasing the parties to a marriage contract on the same terms as they would release the parties to a civil contract. A very slight breach of the latter will render it voidable; but it is not in the interest of public morals that the marriage contract should be treated in any such manner. There is no doubt, truth in the statement: "The general happiness of the married life is secured by its indissolubility. When people understand that they must live together except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off. They become good husbands and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes." But the truth of this statement applies largely to the less fundamental difficulties of married life and to those cases where there is a mutual desire begot of good breeding to overcome difficulties. However, a great many married people do not overcome the difficulties and do not become good husbands and good wives, yet they may not be guilty of improper conduct in the eyes of the law. Under the present conditions of the law, the wife suffers the whole burden.

The situation is this: If the wife has a violent temper or a mean disposition, she may make her husband's life very unhappy; but he can always find relief in distance. True, he must still support his wife, but he is bound to do that whether he lives with her or not. He may have suffered the loss of her society, but after all in such a case the loss would be a gain. The converse case is very different. If the husband is the one of violent temper and mean disposition, he may submit his wife to all the tortures known to unhappy wives. "The husband may subject his wife daily and even hourly to such treatment as makes her life a veritable hell upon earth and she is without remedy if she is robust

enough to suffer it all without impairment of her physical health or her mentality." If she goes away, she is not entitled to support, even though by reason of her physical condition she be unable to support herself, and in many cases she must leave the society of her children. In other words, the wife must humbly submit or cast herself upon the world.

This condition is made worse by the fact that the Courts are bound to interpret the conditions under which alimony may be granted according to eighteenth century standards. A very elementary knowledge of history tells us that social problems of today ought not to be adjusted in the light of conditions of the eighteenth and nineteenth centures, when it was established as a principle of English law that in order that a wife might be entitled to alimony on the ground of cruelty, she must establish as a principle of English law that in order that a wife might be entitled to alimony on the ground of cruelty, she must establish danger to life, limb or health. The social conditions affecting both domestic and civil life were vastly different from those of today. Slavery was recognised and protected by English Law. It was over a quarter of a century later before the law intervened to prevent the flogging of women. Children of six years of age were employed in factories and mines, being compelled to work fourteen and sixteen hours a day under most revolting conditions. Women worked in mines as mere beasts of burden. The woman was little more than a servant of man.

But this is all altered. Society of today has elevated womanhood to a new level and the Legislature surely ought to give our Courts the right to interpret her rights in the light of modern thought and modern ideals.

It is in the interest of public morals that the marriage tie should be very binding, but it is also in the interest of public morals that the honoured mother and wife in a home be given a legal status and legal rights commensurate with the position she holds in the society of today. It is difficult to see in what way public morals would suffer if the bad

tempered husband knows that he must curb his temper or lose his wife.

The law of alimony could well be modified, and the legislature could surely leave it to the Judges of the Supreme Court to determine what is cruelty according to today's standards and according to the various circumstances surrounding the particular case, in the same way as they determine what is negligence, not so much by precedent as by evidence.

The old doctrine of "Danger to life, limb or health," belongs to another century. It has lived to a ripe old age. Its existence is deplored by so eminent an authority as the Chief Justice of Ontario. The Legislature should make haste to kill it, bury it, and leave the Judges of Ontario free to consider all the surrounding circumstances and exercise their own judgment in determining what amounts to cruelty in an action for alimony.

J. C. McRUER.

THE LETTER OF THE LAW.

It has been said that "the letter of the law killeth, but the spirit giveth life," and the question is not untimely. Is the interpretation of Statute law becoming narrower and more literal today than formerly? Some indications, surely, are in the affirmative. There have been numerous instances where a new statute has come up for the first time for judicial interpretation, and the way has been open to the Court to adopt one of two constructions, the one giving to the Statute a reasonable operation though not as sweeping or extreme as its mere words would warrant, the other, looking not at the practical (or impractical) results, but proceeding solely upon a choice of the meanings to be ascribed to the words used, and in many if not most of these cases the latter course has in modern times been preferred.

Without pretending to be exhaustive, this paper will be confined to what is submitted as one of the most outstand-

ing examples of this mode of interpretation, namely, the time-honoured Statute of frauds, a statute which now exists with slight variations in most if not all the Provinces of Canada and in many or all of the United States. As far as the writer is aware, this Statute has been fairly uniformly construed in the various countries where it has been in force, so that the criticisms which are here offered relate rather to the tendency of an age, than to the shortcomings of any one tribunal in particular.

In its very nature the Statute of Frauds is one which relates to matters of evidence, and does not change the substantive law. "No action shall be brought," implies the existence of a good cause of action, and, as matter of proof, requires that that cause must be proved by evidence of a certain kind. It does not in fact prohibit the bringing of the action, but condemns that action to failure for want of proof. Witness the fact that the action is in practice not only "brought" but tried out in the same way as any other action. But what of the case where no proof is or should be required, that is, where the defendant does not deny, but on the contrary admits the truth of the plaintiff contentions? It is well known that the Courts have consistently held that the action nevertheless fails by reason of the Statute. So that the Court becomes fully cognizant of the existence of a perfectly good cause of action, about which there is no shadow of a doubt, and is at the same time powerless to grant a remedy, by reason of its own decisions.

A recent Ontario amendment makes this situation more striking. The law-makers became convinced that in the case of actions for remuneration for the sale of land, legislation should be more paternal, or maternal, towards the defendant, than in actions for remuneration for any other kind of service. They therefore enacted that no such claim should be maintainable unless evidenced in writing duly signed by the defending party or his agent. Then, lest the way of the honest plaintiff who was so credulous as to trust his fellowmen had not been made sufficiently difficult, a further amendment required that the writing must

be "separate from the sale agreement." I do not desire to be led aside from the theme into a discussion of the wisdom or justice of this legislation. That is a topic which might be fruitfully discussed by itself. Under this state of the law, at least one case arose where the agreement to pay commission was in the hand-writing of the defendant, or his agent and incorporated in the acceptance of the offer to purchase and signed by the defendant, and out of the mouth of the defendant were proved (1) his signature (2) his knowledge of the contents (3) that the plaintiff had been instructed by him to sell the defendant's property (4) that the defendant knew the plaintiff to be carrying on the business of a real estate agent, and (5) that the plaintiff had been the effective means of selling the defendant's farm on the terms accepted by the plaintiff. Yet the Appellate Court dismissed the plaintiff's claim with costs.

In other words, while "he who comes into equity must come with clean hands," if it is law, he may, in the alternative, keep his hands in his pockets. He need not show his hands, but, without affirming or denying, may leave the plaintiff, with the just cause, to play a lone and losing hand.

In the first volume of Blackstone's inimitable "Commentaries" he says:—

"The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceased, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius. There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed

the benefit of the law. Now here all the learned agree that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit, which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation."

Over and over again, the conviction forces itself upon one that we have wandered somewhat from the wholesome principles on which this decision was based, and that if that case had arisen today, the sick man would have been awarded the ship and contents.

If the operation of the Statute of Frauds had from the first been limited to cases where the facts on which the claim was based were denied under oath, would it not have served one hundred per cent. of the purposes for which it was intended, without having itself become, as it undoubtedly has, the father and protector of many hundreds of frauds?

We are familiar with the reasoning of the Courts in these matters. They say, "If the Legislature had intended the operation of the Statute to be limited in that way it could very easily have said so." But the same reasoning could have been adopted with equal ease and with equal injustice in the instance cited by the learned author above named. If the legislative body in that case had intended to confine the benefits of the decree to persons who "voluntarily" stayed with the ship, it could very easily have said so by the addition of one word.

The fallacy of this reasoning, it is submitted, consists in the fact that it involves the supposition that the Legislature is omniscient, instead of assuming, as is universally appreciated, that the Legislature cannot possibly foresee all possible situations which may arise and so must rely on the Court to give reasonable operation to the Statute, having regard primarily to the purpose for which it was passed.

It is rather fruitless, of course, to expatiate on these evils without pointing to a remedy, and the tendency has been too

long in the one direction to warrant the hope that it might suddenly change at the sound of the voice of one crying in the wilderness. One suggestion, however, might be recorded in the spirit of hope that it might yet be taken up and brought to the rescue. In the language of the Courts, "The Legislature can easily say so." In other words the remedy is in the hands of the Legislature. Within the past few years there has been introduced into the practice in the Ontario Courts what has become commonly known as the "affidavits of merits," though not so designated in so many words in the rules. The effect of the provision under which this affidavit is required is, briefly, that in certain classes of actions the defendant is not entitled to defend, and judgment may go against him, without the taking of any evidence, unless he says in writing under oath that he has a good defence and discloses in like manner the nature of that defence. This practice has resulted in the saving of much idle and costly litigation and has served its purpose without any resulting hardship. Could not an analogous provision be added to the Statute of Frauds requiring the defendant to deny under oath, either in affidavit or otherwise, the facts set up by the plaintiff, or deny in partial degree and to a sufficient extent to be an answer in law to the plaintiff's claim, before being allowed to set up the Statute of Frauds as a bar to the action? This would be no hardship to an honest defendant, and would prevent many a dishonest defendant from setting up, as a shield against the payment of honest obligations, a Statute itself designed to prevent fraud.

ARTHUR A. MACDONALD.

A NOVEL LAW SUIT.

The Supreme Court of the United States is, we are told, to be asked to determine whether the Bible can be legally excluded from the public schools of that country. It is said that prominent men in the various Presbyterian Churches are heading a movement to bring a test case

before the nation's highest tribunal. It appears that "the State of Washington, which officially excludes the Bible from its public schools, will furnish the basis for the case. The line of attack will be based on the Declaration of Independence, which, it is maintained, is a covenant between the American nation and God. Hence, the study of the Bible by American children is held to be essential to an understanding of the covenant and to full knowledge of God. To exclude the Bible from the public schools, it is contended, is to violate one of the essential clauses of the opening paragraph of the Declaration of Independence."

Apart from any religious aspect of the subject, with which a legal journal has no concern, history demands the acceptance of the fact that an open Bible has proved to be, without doubt or cavil, the great elevating, educative ennobling and energising force which has given to the world its highest and best form of civilisation. All lovers of their country should be hopeful that the result of the test case may be to carry out the thought of those who drew the Declaration of Independence. It would be well, for the future of this Dominion if its children were given without stint the benefits of this great uplifting and purifying force.

CLASS LEGISLATION.

In an address delivered at the annual banquet of the Illinois Bar Association, Mr. Nicholas Murray Butler made some pertinent observations worthy of note in the present condition of things in this country.

As we all know, the game of party politics is an old one. Probably its origin is at least as ancient as that of the game of chess, hidden in the mists of bygone centuries; not however as respectable, if the saying of the elder Disraeli is to be accepted as correct. He said:—"Politics is the art of governing men by deceiving them." Speaking on the subject of politics in connection with "The changing foundations of Government," Mr Butler said:—"A labour party, or a farmers' party, is as un-democratic and as un-

American as a millionaires' party or a shipowners' party would be." In speaking of a recent American statute Mr. Butler said:—"This law established a privileged class among us and thereby increased the cost of living to every man, woman and child under the American flag." He then referred to a kindred class of legislation in language which has much of interest in some of the Provinces of this Dominion:—"The use of the power of the State to enforce some particular rule of conduct, which those to whom it appeals describe as moral, may easily differ only in form and not in fact from the long since abandoned use of the power of the State to enforce conformity in religious belief and worship. Private morals and private conduct are matters for the conscience of the individual and not for regulation by some majority which, at best, can only be temporary."

The speaker must have been taking notes as he passed throuhg Canada.

THE PRESIDENT OF THE CANADIAN BAR ASSOCIATION.

The splendid service rendered to the Bar of Canada by Sir James Manning Albert Aikins, K.C., Lieut.-Governor of Manitoba, in connection with the Canadian Bar Association has found expression in a striking and unusual manner, and comes, we may also say, from an unexpected quarter. The Anglo-Saxon mind, though quietly appreciative, is slow of, and stolid in expression as compared with the brighter, warmer, more imaginative and genial temperament which characterises the Celt. It is to the latter feature that we now call attention to in a graceful tribute to the one whose name we here refer to.

None but those of our legal fraternity hailing from the Province of Quebec would have thought of the presentation which they made to Sir James on the anniversary of his 70th birthday. We all know something of what he has done for us; we have all heard of his princely gift to the

endowment fund of the Association; but few know of the time and labour he has expended in developing and fostering a venture which most men thought could not succeed by reason of the vastness of the territory over which are scattered the legal fraternity of Canada, and the almost unsurmountable difficulties and expense in gathering them together in one central spot.

The occasion referred to was a meeting of the Manitoba Bar Association at a luncheon tendered to Sir James as a mark of hearty appreciation of the many qualities which endeared him to his professional brethren and which had won for him their esteem as the Lieutenant Governor of Manitoba and as President of the Dominion Bar Association.

The incident we specially refer to on this occasion was the presentation to Sir James, by one chosen for that purpose, of a very handsome loving cup sent to grace the event by the Bench and Bar of Quebec. The gift was accompanied by a letter of congratulation signed by Chief Justice Lemieux of Quebec on behalf of the donors. We regret that space does not permit our publishing it in full. It was a long and eloquent reference to the service, character and personal attributes which had won the esteem of Sir James' brethren of the Bar of Old French Canada; and it was couched in the graceful and affectionate language which told of its origin. We are glad to say that we of the Anglo-Saxon Provinces are of the same opinion, concurring on all points with no dissenting voice.

THE VOCATION OF AN ADVOCATE

Address by Rt. Hon. Sir John Simon, K.C.V.O., K.C., delivered at the annual meeting of the Canadian Bar Association.

It is quite impossible for me to enter upon the discussion of the subject which I have set for myself this evening without in my first sentence thanking you for the warmth and kindness of your welcome and assuring you that I

regard it at once as the greatest and the most pleasant compliment that has ever come to me in my life as a private professional man that I should have received the invitation which Sir James Aikins sent me to attend the meetings of the Canadian Bar Association. This Association, modelled on the lines of an older association in the United States, is to everybody who takes an interest in the science and in the fellowship of the law one of the most interesting and surprising of societies. I hope nothing that I shall say tonight will be thought to belittle the professional patriotism of English barristers, but it would be quite impossible by any inducement to call together a great convocation of English barristers in the first week of September—(laughter)—and, realising as I do from the acquaintances and the friendships that I have made during my stay amongst you, that here gathered in the capital city of the Dominion you have men of the law, busy men, overworked men, I dare say, in need of a holiday, as all lawyers are, who have deliberately travelled enormous distances, both from the East and from the West, in order to join with their colleagues in these debates and discussions, I cannot tell you with what interest and admiration an English barrister like myself, and, I am sure, like my friend Sir Molcolm Macnaughten, finds himself amongst you.

If anything could add at once to the pride and to the pleasure with which I find myself here as your guest, it would be to come here when the Society is showing all indications of rapid and vigorous growth which your munificient president, Sir James Aikins, year by year leads to greater triumphs, and to find myself at your annual meeting under the chairmanship of my old friend Mr. Justice Duff. (Applause.) Mr. Justice Duff and I made one another's acquaintance long since. We shared the labours of a difficult and anxious time eighteen years ago, and it is one of my pleasantest memories that from the time down to today, the friendship between us has always remained close and constant.

But indeed, ladies and gentlemen, happy is the practising English barrister whose work takes him in those directions which make him the colleague of the Canadian bar. There are no more generous colleagues; there are no more kindly

opponents; I hope I may say with truth, there are no more considerate critics, than the lawyers of Canada with whom some who practise in England from time to time come in contact. And when I think of this great association and all that it represents, all that it stands for today and all that I am convinced it is going to do for Canada, for peace, for good government and for the profession of the law in times to come, it seems appropriate in addressing this assembly to choose as my subject the Vocation of an Advocate.

So much, ladies and gentlemen, in the comfortable language of mutual praise. (Laughter.) But this is the Palace of Truth and we may as well begin by admitting that, whatever be the explanation, there is in some quarters a painful prejudice against Lawyers. (Laughter.) I think many of my Canadian colleagues must feel, as so many of us feel at home, whether in our professional sphere, our strictly professional sphere, or whether in the public work which lawyers have in time of crisis so often undertaken, that we are a misunderstood class. We are denounced for vices which we never practise, and, what is even more surprising, we are acclaimed for virtues which we seldom attain. (Laughter.) By novelists, for example, and by dramatists, and, I suspect, by a large part of the general public too, a lawyer at his worst is an unprincipled wretch who is constantly and deliberately engaged in the unscrupulous distortion of truth, by methods entirely discreditable, and for rewards grotesquely exaggerated. (Laughter.) Even at his best, a lawyer in the minds of many people is marked only by a supernatural coolness and an almost infernal cunning, by means of which he discovers at the last moment an argument which nobody has thought of, or produce a witness from some forgotten corner as a conjurer produces a white rabbit from the tails of his evening coat and thereby, when all seems lost, overthrows the obstinate and rescues the innocent.

Speaking to my brother lawyers and here in the Temple of Truth, don't you agree with me that both those pictures are exaggerations? (Laughter.) It is not true that a lawyer spends his life in the dishonest and unprincipled pursuits of distorting fact and colouring truth; and it is not true either that by waving some rhetorical wand in

Court he works miracles and compels agreement. The truth about the matter is that a lawyer is a very plain matter-of-fact, hard-working person, who devotes long hours in private to preparing what may not show for very much in public; and I say with great boldness to you that a lawyer is neither so unscrupulous nor so ingenious as some people make out—at any rate, I make bold to say that we know of other lawyers who are neither as unscrupulous nor as ingenious as some people suppose.

We lawyers "conscious as we are of one another's shortcomings" are prepared to deny the popular description of the character of the advocate's art, and I stand here tonight to contend on behalf of our lawyers' craft that just as it is true there is no royal road to success or fame without unremitting labour, so on the other hand, it is a vocation which calls for, and which does not call in vain for, the nicest sense of honour and the strictest devotion to justice. (Hear, hear, and applause.) Therefore it is as a lawyer who is proud of his profession, who believes it is a great and necessary calling, which contributes much to social justice and is essential for the progress of society, that I invite you to consider for a few moments some characteristics of the vocation of an advocate.

And first, ladies and gentlemen, allow me on behalf of the practising members of the profession to get rid of one antiquated fallacy. It is astonishing what a number of people believe that as indeed somebody once said, that the bar is not a bed of roses, for it is either all bed and no roses, or else it is all roses and no bed. I for my part find it very difficult to believe some of the stories that are told of the uninterrupted and continuous labour, hour after hour, night and day, which has been undertaken in the pursuit of our profession by some distinguished advocates in the past. I have been assured, however, for example, by the son of a former Lord Chancellor, that when his father was at the Bar he never went to bed for a week. (Laughter.) Well, that is hearsay evidence.

I have heard a successful English barrister declare that there are only two things needed for success at the English bar; the first of them is a good clerk, and the second is a good digestion. (Laughter.) But I happen to know that that particular member of the bar never argues a case

without having very fully and carefully studied his brief; and I think our talk tonight would not be without its value if it would do something to disabuse the public mind of the idea that advocacy is a sort of tour de force in which a man, under some sudden inspiration, whether by the superior or the inferior deities, dashes in, and, relying upon the divine afflatus, delivers himself of some overwhelming argument, couched in language of the most elaborate rhetoric, and thereby proves that the worse is the better reason. It is not true at all. I do not believe that there is any great profession in which honourable success is attained without unremitting labour. The old definition that genius was an infinite capacity for taking pains is open perhaps to the objection that genius is so rare a quality that no analysis will discover how to attain it; but that no man unless he is prepared to devote everything that he has in can attain a great position in our profession of the law his powers of mind and concentration upon the work he has to do and the preparation for the case he has to argue, is, I am convinced, the experience of all those who have tried this strenuous competition, and all doctrines to the contrary are quite unfounded.

It was Plutarch, I think, who said, in his account of Demosthenes, that when Demosthenes was asked what was the first and most important thing in oratory Demosthenes replied, "Action." And when he was asked what was the second most important thing Demosthenes again said "Action." And when he was asked what was the third most important thing Demosthenes again said "Action." Well, I have often wondered how Demosthenes ever came to talk such nonsense; but perhaps the explanation is that somebody has misunderstood Demosthenes, and that when he spoke of action he must really have referred to the necessity of unremitting and continuous work.

Let me for instance remind you of an incident in the life of a great lawyer, Charles Bowen. Charles Bowen was one of the two juniors in the famous Tichborne litigation. Mr. J. C. Matthew was the other, who was afterwards Lord Justice Matthew and a very distinguished and powerful commercial judge in England. The Tichborne litigation was a case in which the plaintiff's cross-examination lasted

22 days. The hearing of the plaintiff's case lasted 70 days. The opening speech for the defence lasted a month. (Laughter) And, most astonishing of all, the summing up of Chief Justice Cockburn in the subsequent proceedings for perjury which were taken against the person who claimed to be the inheritor of the Tichborne estates—the summing up of the Chief Justice Cockburn lasted 18 days and occupied 188 columns of the Times newspaper. Well, that was something like a case. (Laughter.) And Charles Bowen's biographer points out that Mr. Bowen was engaged as a junior in that case from the middle of 1871 to end of February 1874, and his biographer says this: "He devoted to it the whole of his powers, intellectual and physical. His familiarity with every fact of it was complete. He used to say that he did not believe that there was a single fact or a single date in the evidence of which he was not fully cognizant and of which he was not prepared on the spur of the moment to give an immediate and correct account." And yet, ladies and gentlemen, when that Tichborne case was over, when the Tichborne estates down there in Hampshire were confirmed in the hands of the man to whom they really belonged, and when this unhappy claimant had been sentenced to seven years' penal servitude, I should doubt whether there was a single fact, or a single date, or a single circumstance in the whole of that immense accumulation of detail—all of which was in Charles Bowen's memory—that was of the slightest permanent value or interest to anybody on earth.

There is the real character of a lawyer's life. He is constantly under the duty—and if he regards his profession seriously it is a most solemn duty—of learing the detail about his client's business with a precission and a minuteness which passes long beyond the bounds of what is interesting or permanent, and when he has done it he has to face the circumstance that this vast and detailed study may very well, to a large extent, be wasted labour. Truth may lie at the very bottom of the well, and all the pumping out of the liquid that lies above it only serves to find at last the one small point, which a practising lawyer so often discovers to be the key and heart of the mystery.

Next to the advocate's willingness to seize upon, analyze

and understand the details of the case which he is preparing for trial—I myself would put next in the armoury of the advocate the power to select out of this vast mass of detail the things that really matter, and the courage to reject, in the face of his client's reiterated desires, in the face of every other temptation, the accumulation of unnecessary material, which is better left undealt with. The Tichborne litigation was of enormous length and there may have been good reasons why it lasted so long but in my judgment and so far as my own experience goes, other things being equal, the shortest argument is the best.

I have heard advocates say that it is always necessary to repeat an argument at least three times, especially if you are addressing a tribunal which consists of more than one judge. (Laughter.) You have to repeat it for the first time in order that one judge may understand it; you have to repeat it for the second time in order that he may explain it, while you are repeating it, to his brethren (laughter.); and you have to repeat it for the third time in order to correct the erroneous impression which he has unfortunately conveyed. (Loud laughter and applause.) Sir James Aikins, this is a meeting of the Canadian bar. (Laughter.) The judges are here only by sufferance, and I am speaking not of the duty of a judge—it is a thing of which I know nothing at all—but on the wholly different subject of the vocation of an advocate and it is selecting out of a great mass of matter of that which is really important which is really going to tell, which is really going to carry the day. It is a thing which requires sureness of judgment, and it requires strength of character. The lay client is so familiar with his own case that he sometimes finds it very difficult to communicate all the relevant facts of the case to his professional adviser, but on the other hand it is extraordinarily difficult for the lay client to believe that his professional adviser, if he omits any fact in the case, is not doing so either from ignorance or from indolence, or from indifference, or, it may be, from a desire to get as soon as possible into another court. And yet, recalling after an experience of twenty years the arguments that have really impressed me—both arguments in point of law and arguments on questions of fact—I feel more convinced to-day than ever

that one of the most important things at which every advocate ought to aim is this economy of his material which enables him to present a picture in which everything that is critical and salient stands out, and where there is no danger that anybody will fail to see the wood for the trees.

Speaking now from the point of view of advocacy, I do not greatly admire the famous speech of Portia in the Merchant of Venice. Of course she was a lady barrister—(laughter)—and I believe it was her first brief; so on both grounds we must speak with indulgence and consideration. But I don't greatly admire her performance as a matter of advocacy. No doubt that was a very fine passage all about the quality of mercy, and it would have been a most admirable way of addressing the court, supposing that Antonio was going to be convicted; but when she had got in reserve that point about the pound of flesh, I must say I think she ought to have brought it out immediately. If I had been the Duke of Venice, though I should have decided in Portia's favour, I should have made her pay the costs of the first half hour of the hearing. (Laughter.)

But then, lawyers and barristers and judges are notoriously impervious to the influence of poetry and the drama. I remember to have been told a story of a very shrewd, but peculiar English judge, who, I believe, was one of the best judges of a horse that ever sat upon a bench (laughter), but who sometimes avowed curious literary opinions, meeting one day in the Temple, in London, with Serjeant Taulford, who, besides being one of the King's serjeants, was a great Shakesperian authority, this lamented judge said to Taulford: "Taulford, you know about Shakespeare, I believe. Tell me, what is the best play of Shakespeare to read, for I have never read any of them?" Serjeant Taulford gave the rather surprising advice that he thought the best play to begin with was the tragedy of Romeo and Juliet, and meeting the judge about three weeks afterwards, asked what he thought of it. "What do I think of it? Why, I don't think anything of it. It is a tissue of improbabilities from beginning to end." (Laughter.)

So far as I have been insisting that in the outfit of the advocate, apart altogether from any question of knowledge

of law or knowledge of man, or knowledge of women, all of which are very necessary ingredients in his composition—I say nothing of the even more necessary knowledge of judges (laughter)—so far I have been insisting that in the outfit of the advocate the two things that are most important are: first, the ability and the willingness to work, so as to accumulate all the material available; and, secondly, the judgment and the character which will winnow out of these materials and select what is really necessary for the purpose in hand. Accumulation, selection, rejection,—those, I think, are the reading, writing and arithmetic of advocacy.

I know it is said, and some people believe it most fervently, that since advocacy is the art of persuasion the most important thing in advocacy is to make a flowery speech. Well, forensic eloquence has, so we are told by historians, flourished in various ages, but I cannot bring myself to belief that highly rhetorical periods really ever have had, either on judge or on juries, quite all the influence which historians and biographers assure us they did have in the case of the particular subject of their admiration. At any rate, it is a product which does not keep. Can anything be more depressing than reading the rolling periods even of great speeches like Brougham's defence of Queen Caroline —I would almost say, of Burke's impeachment of Warren Hastings?

I think it is said of Lord Erskine that on one occasion when he appeared for a candle maker before a common jury at the Guildhall in the City of London, in an action for libel, he began by saying: "Gentlemen of the Jury, the reputation of a tallow chandler is like the bloom upon a peach. (Laughter.) Touch it, and it is gone forever." (Laughter.) I feel certain that Lord Erskine got justice and considerable damages for his client, but I have great difficulty in believing that it was his rhetorical language which greatly weighed the scales in the plaintiff's favour.

The truth is that at its best forensic eloquence is like dry champange—if indeed I may be permitted (laughter) in this part of the world to make such a reference. (Laughter.) That is to say, however effervescent it may be when the bottle is first opened, it is impossible to preserve it in a good state for very long. There is not, after all, very much

difference, at any rate in courts of law, between bathos and pathos, and the line even in greatest oratory is a very fine one. Everybody who takes an interest, as all lawyers must do, in the art of speech, recalls perhaps the most famous, most moving passage ever spoken in the British House of Commons in the last century,—the passage in John Bright's oration dealing with the Crimean War which contains the famous phrase: "The Angel of Death is amongst us. You may almost hear the beating of his wings." And yet it is a good House of Commons tradition that when Mr. Bright went out into the lobby and received the congratulations of his friends, one of them said "It is just as well you said 'beating', for if you had said 'flapping' we should have laughed." (Laughter.)

Now, Mr. Justice Duff, I had intended in what I first sketched out for myself to occupy some portion of my time, and perhaps a major portion of the time, in discussing a question always, I think, interesting, and one which is of importance both to professional lawyers and to those of the public who take an interest in the law,—the question as to how it is possible to reconcile the duty and function of an advocate with the dictates of morality. But after I had accepted the invitation which Sir James on behalf of the association so kindly conveyed to me, I found that last year there had been delivered at a meeting similar to this, and is recorded in the transactions of the association, a most admirable address—if I may be allowed to say so—on this subject by Chief Justice Mathers. I have read it—I hope everybody has read it—with the greatest interest and appreciation. Therefore I will curtail what I had intended to say on this subject, though I will not entirely omit it. The problem is a familiar one. Most members of the bar have been challenged at at some time or other with the question "How it is possible, Sir, that you should be prepared to defend a guilty man?" We all know that question, and it is worth considering for a moment, because it has a direct bearing on the question as to what is the real nature of the vocation of the advocate.

Now is it consistent with the duty of honour and candour to espouse what may be the worse cause, and perhaps, still more, to resist an argument which may turn out to be, and may upon its face appear to be, founded on truth? How is

it possible that the member of an honourable profession should lend his powers of intellect, judgment, experience, argument, to the wrong side? And I venture to put the real answer in my own way. The real answer, ladies and gentlemen, is that an advocate does his work under strict and severe restrictions of professional duty, imposed by a strict code of honour, for the very purpose of securing that he may discharge this difficult task, which is essential to the administration of justice, without selling his own conscience or being false to the duty to which he owes to justice and to the state. The function of an advocate is not to ascertain the truth; the function of an advocate is to present from one side of the case all that can be usefully and properly said, in order that it may be compared with what is presented from the other side of the case, so far as that can be usefully and properly said, and in order that the tribunal may then have before it these competing considerations and may hammer out on which side the truth really lies.

Take for instance the true position of an advocate who has the duty of prosecuting in charge of crime. There are a great many people—you see it in magazines and story books constantly—who really believe that a barrister who has a brief to prosecute a criminal is aiming at securing his conviction at all costs. That is a libel and a travesty upon the whole profession of the law. The business of an advocate who is prosecuting a criminal is to be in the strictest sense a Minister of Justice. His duty is to see that every piece of evidence relevant and admissible is presented in due order, without fear and without favour; and unless there be some other advocate to assist the accused, it is his duty to present the evidence which is in favour of the accused with exactly the same force and fullness with which he calls attention to the circumstances tending to make a suspicion against him. His business, in Othello's words, is this "Nothing extenuate, nor set down aught in malice." And I would say that fundamentally the position of a barrister who is prosecuting a criminal is a mere example and epitome of the kind of honour and the sort of conscience which ought to be shewn in all branches of the advocate's work.

Take the case of defending a criminal. What is the real

duty of an honourable man who has put upon him the heavy burden of defending a person accused of a serious crime? First to develop the whole power of his mind and all the resources of his experience to the task. There is an honourable tradition, at any rate of the English bar, that even a man who may be busy with many different cases, if he undertakes and is called upon to defend the meanest criminal charged with a crime, is bound to give his own personal attention to that work, odious and unremunerative as it may be, to the exclusion of all other business coming his way. And in what spirit should it be discharged? It is, I venture to say, essential to the cause of justice that we should have the service of a man professionally trained who will defend those who are accused, and will defend them by making sure that the most is made of every flaw and of every gap in the net which seems to be closing round the unhappy man; who will make certain what all shall be said on the accused's behalf which the accused could properly say if he were not embarrassed in his situation and thereby largely preventing him from speaking.

True it is, Mr. Justice Duff, that the law, in its effort to secure that the accused should get fair play, has according to some people done nothing but make things worse for him. Time was when a man accused for a crime under the old common law of England stood there without counsel—unless indeed somebody could find a flaw in the indictment and counsel were assigned to argue the point—and juries and judges refused to convict such people because they felt they were not having fair play. And then there was interposed the benevolent but possibly mistaken intervention of the legislature, which deprived the accused person of that advantage and gave him the right to employ counsel. It was still possible that he could not afford it, and thereupon the legislature came forward and deprived him also of that excuse by arranging that in proper cases he should be provided with counsel for nothing. There remained now only one further refuge for the unfortunate man, who wanted nothing better than that he should still sit in the dock and say nothing and do nothing until the thing was over. It was always possible for his advocate, when everything else failed, to say "Ah. gentlemen of the jury, you have heard

evidence against this unfortunate man, but his lips are closed; he has no right to take the witness stand and testify out of his own mouth as to what happened." Thereupon Parliament intervened and said, "Oh yes, you may testify," and the last protection and refuge which the common law had cast round the person who was short of an adequate explanation (laughter) has been removed—has been removed by the legislature in the supposed interests of the accused. (Laughter.)

But, after all, the real object of the law in this matter is not that guilty people proved to be guilty should escape; the fundamental object of society is that while the law should be vindicated, justice should be done as far as fallible human society can do it, and that, whatever happens, we should run no risk that the innocent should suffer without cause. Therefore I would say—and I am addressing myself more particularly to those who are not lawyers —I would say to those who have been seriously concerned (ladies quite as much as men) as to how an advocate can justify his appearing on the side which may be the wrong side and defending a man in respect of a crime which there seems every reason to think he may have committed, I would say, remember that the object of criminal courts is not to punish those who in their hear of hearts know that they are guilty; the object of a criminal court is to administer proper punishment to those who are proved by adequate and forcible evidence to be guilty; and it is vital, if you are going to protect innocent people from the results of unmerited suspicion and unfortunate coincidence, that you should have the trained assistance of an advocate, bound by strict rules of honour as to the part which he has to play, in order that he may test this alleged chain of evidence in every link and may see whether there be not good ground for urging that at some point it fails.

It is for that reason that by the universal tradition of every bar which follows the old methods and principles of the common law, no advocate in any circumstances should ever permit himself to assert his own belief in the merits of the case which he is arguing. I think probably even the most experienced of us have sometimes found it difficult always to obey this rule, but it is a rule which is vital if justice is going to be done; for if once a man who is honestly

convinced that he is arguing on the right side of a cause is at liberty to assert his own personal belief in the cause which he is arguing, the day is not far distant when the cause which is not so obviously just will either have to go without defender or, what is even worse, will be in the hands of men who are prepared to stimulate and to assert a personal belief in a cause in which they do not really believe. It is for that same reason that it is as impossible and unthinkable that an honourable advocate should manufacture evidence as that he should conceal or distort obvious, available testimony. And it is these principles, which are most simply illustrated in the case of criminal trials, which, as I think, are the very life and soul of the honour of the bar.

But I think, Mr. Justice Duff, if one is trying to give a correct account of this branch of the subject, one ought also, for the benefit of those who are not practising lawyers or judges, to add this. The real truth of the matter is, ladies and gentlemen, that the question, "How can you espouse the wrong cause?" is to a large extent based on a fallacy and a confusion. Law is a very complicated thing. We live in a society where fair dealing and justice are secured by a system under which the judges will ascertain how the law applies to the facts of the case, so that one man may be treated in the same way as any other man in the same circumstances. That is equality; that is justice; that is liberty; that is democracy. But in nine case out of ten it is only at the end of the case, and not at the beginning of the case, that anybody knows which side is the right cause. After all, one of the great merits of the bar is that people do not go to law unless there is a real problem to be solved. I have always thought that the profession of a lawyer in this respect compares favourable with the profession of the doctor, and I perhaps might even say, with the profession of the spiritual adviser. People go to doctors when they are not really ill; and one, I believe, of the most useful attributes of a fashionable physician is a bedside manner. People consult their spiritual advisers on problems which sensible men or women can, I think, very often decide for themselves. But nobody outside a lunatic ever went to law unless there was something very much the matter with him,—unless their is at stake either his life, or his reputation, or his wealth, or his home, or his honour, or

one of these things for the sake of which a man will think it worth while to sell all that he has in order that he may fight for that which he prizes. Therefore the profession of the law, in that respect, is one which all of its members ought to regard as calling for the most special and unremitting devotion to duty. The case, my brethren of the bar, may seem to be a small, unimportant case to us. It may be a small incident in the course of a long professional career and when it is disposed of it passes from one's memory. But there is probably somebody to whom that little case which occupied so small a fraction of our own professional life means everything that is important, or everything that is dear. I think one of the noblest things, one of the finest things about the profession of the advocate is that it is to him that men and women must turn in moments of the greatest personal anxiety. They put the whole issue into the hands, it may be, of a man whom they do not know, of whose record they may be imperfectly acquainted, but who, at any rate, has this recommendation that he is a member of an honourable profession which will devote itself to the end and to the last to serve the man or the woman who trusts his fate to his charge. (Applause.)

At the same time I think it must be admitted that difficult cases do sometimes arise in the course of advocacy under this head: "How are you to act when the contention or the case put before you conflicts with your own knowledge or judgment of the circumstances? You remember, I have no doubt—perhaps I may be allowed to recall—the hard case and the sad case of Mr Charles Phillips. Mr. Phillips was an Irishman; not the first Irishman that came to the English bar, nor the last, but an Irishman with many of the great qualities of that great race, who attained a great reputation, in largely defending criminals, in the middle of the last century, in London. Charles Phillips was called upon to defend, in the year 1840, a Swiss valet whose name was Courvoisier. Courvoisier was the personal servant of an old gentleman—I think he was 73 years of age —Lord William Russell. He saw this gentleman to his bedroom the previous night. He left him in his chamber. Courvoisier himself lived in the basement of the house, and slept there until morning, and when the morning came and

one of the women servants first went to rouse Lord William Russell she found the place in fearful confusion, she found her master horribly murdered in his bed, signs of blood and violence on every side, and all the indications that there had been in the night a savage attack upon him, apparently for the sake of robbery. They not only found that, but they found that there were marks upon the floor which led to the outside premises at the back and there was every indication that the authors of the dreadful crime had forced their way in through this door and made their way to the old man's bedroom while he was asleep and there had foully murdered him. And Courvoisier, this Swiss servant, for reasons which the police believed to be adequate —it was in the very early days of what was then the new police in London, started by Sir Robert Peel and known as "Bobbies" and I think they were very zealous in their duties—this Swiss fellow Courvoisier, being suspected, was put upon his trial for murder, and Charles Phillips undertook his defence. He defended him with very great vigour and skill. The evidence against Courvoisier was serious, because some, at any rate, of the things which had been stolen had not been carried away from the house, but were found hidden in places where it seemed more natural that a servant who knew the premises would hide them than anyone coming from outside; and, what was worse, Courvoisier, the valet, who used to wear when he was waiting at table white linen gloves, had apparently got a pair of white linen gloves much stained with blood, which he had been at pains to conceal. And in the middle of that trial at the Old Bailey, when Phillips was doing all that he honourably could, with his intense Irish brilliance, to defend this Swiss servant, Courvoisier indicated that he wanted to speak to Charles Phillips and he told Charles Phillips that he had committed the murder; and, having conveyed this surprising piece of information he said: "And now I rely upon you to do the best you can to prove that I have not."

I believe that many people think that this ofen happens in the course of a criminal lawyer's experience. I am quite sure that it is not so. I am quite sure that the natural temptation of a man who means to fight against a charge of crime, to deny the imputation in the face of the world, is a temptation which also affects him in communicating

with his professional advisers. At any rate it has always been so in my experience.

Well, what was Mr. Phillips to do? It so happened that in addition to the Chief Justice who was trying the case there was sitting on the bench another and very famous judge, Baron Park, and to Baron Park, who was not himself trying Courvoisier, but was none the less sitting there beside the Chief Justice, this unfortunate Charles Phillips went in the greatest distress, and he enquired from Baron Park what course in the learned judge's opinion he as an honourable advocate. And Baron Park told him that unless Courvoisier released him from the obligation which he had accepted to act as his advocate his duty was to go on with the defence, notwithstanding the fact that this confession had been made to him.

Charles Phillips is dead now, of course. I confess I think that a grave injustice had been done to his memmory. Acting upon the advice which Baron Park gave to him he was quite right, and so far as I have been able to follow what subsequently happened, it seems to me that Mr. Phillips behaved with propriety. It was said of him long afterwards, but I think quite, quite falsely said, that in the course of the defence which he set up, after having had this confession of guilt, he used arguments which endeavoured to throw the suspicion of the crime upon some other person. I do not think he did; although I entirely agree that if he did so, it would be highly improper thing in the circumstances to do. But I tell that story because it does indicate what I believe is a very rare situation in the history of practical advocacy. It does illustrate how that situation must be dealt with in cases where it arises.

On this part of the subject let me end by reminding you of a quotation from Boswell which puts the point with the greatness neatness. Boswell records Dr. Johnson as saying:

"We talked of the practice of the law. Sir William Forbes said, he thought an honest lawyer should never undertake a cause which he was satisfied was not a just one. 'Sir,' said Mr. Johnson, 'a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is

to be decided by the judge. Consider, Sir, what is the purpose of the courts of justice? It is, that every man may have his cause fairly tried, by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the judge, and determine what shall be the effect of evidence,—what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself, if he could. If, by a superiority of attention, of knowledge, of skill, and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage, on one side or the other; and it is better that advantage should be had by talents than by chances. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.' "

CANADIAN BAR ASSOCIATION.

ANNUAL MEETING, 1921.

REPORT OF THE COMMITTEE ON LEGAL EDUCATION.

The Committee of Legal Education are pleased to be able to report a very encouraging response from the various provinces of the Dominion to the recommendations made by this Association last year regarding a uniform curriculum of legal education in the Common Law provinces of Canada.

The reports received by the Committee from the different Provinces, taking them in their order from West to East, are to the following effect:

British Columbia—From British Columbia it is reported that the Benchers there have formally adopted the curriculum recommended by the Canadian Bar Association with

what has been called the very slightest or practically no amendment.

Alberta—From Alberta it is reported that the Benchers are discussing arrangements with the University of Alberta under which the University will undertake the teaching of law in that Province. While matters are still in the stage of discussion and organization, members of the Committee from Alberta are of opinion that satisfactory arrangements will be made between the Benchers and the University and that, when such arrangements are completed, the curriculum recommended by the Canadian Bar Association is likely to be adopted.

Saskatchewan—From Saskatchewan it is reported that the curriculum recommended by the Canadian Bar Association has practically been adopted. Advices received from Dean Moxon at the University of Saskatchewan and from the Secretary of the School at Wetmore Hall, Regina, indicate that the curriculum is already in operation or will be within the coming year.

Manitoba—Dean Thorson, of the Manitoba Law School, reported to the Committee that the curiculum adopted in Manitoba follows the curriculum recommended by the Canadian Bar Association with the exception of one subject, namely "Shipping or Railway Law" in the third year.

Ontario—The reports received by the Committee from Ontario indicate that, while the Ontario Bar Association have within the past year expressed a keen interest in the matter of legal education and have made representations to the Benchers of the Law Society of Upper Canada with a view to bringing the Law School at Osgoode Hall "to such a state of perfection as will make it the equal of any of the great schools in other jurisdictions" the Benchers of Ontario have not as yet taken any action regarding curriculum.

Quebec—Dr. Ira A. MacKay, of McGill University Law School, reported to the Committee that the curriculum adopted at McGill for the course in Common Law follows the curriculum recommended by the Canadian Bar Association with only such minor adaptions as are necessary to suit their special conditions.

New Brunswick—From the Province of New Brunswick the Committee has had no report, as none of the members of the Committee from that province is in attendance at this meeting.

Nova Scotia—The curriculum at Dalhousie Law School is the same as that recommended by the Canadian Bar Association. The curriculum prescribed by the Nova Scotia Barristers' Society has not yet been brought into line but it is hoped that within the coming year action will be taken by the Society in that direction.

Prince Edward Island — The reports to the Committee from Prince Edward Island indicate that no action has so far been taken in that Province, but there is a prospect of the matter being pressed upon the attention of the Law Society of Prince Edward Island this coming year and the hope is expressed that some action may be taken.

On the whole, therefore, with regard to the reaction of the various Bars to the recommendations of the Canadian Bar Association, the Committee feel very much gratified and very much encouraged.

The Committee considered the question of a further increase in the preliminary educational training which should be required from students entering upon the study of law and decided to offer no recommendations at the present time. The Committee, however, noted with approval the intention, as reported to the Committee, of the Manitoba Law School and the McGill Law School to make effective next year regulations which will require from students entering upon the study of law an educational standard equal to that of a student at the end of his second year in Arts.

In this connection, it may be well to recall that this Association at the meeting held in Winnipeg in 1919 recommended that a student entering upon the study of law should have an educational preparation equivalent to that represented at the end of his first year in Arts. So far as the Committee are aware this standard is now in force or about to be put into force in all of the Common Law provinces, with the exception of Prince Edward Island and New Brunswick. In Prince Edward Island the standard required is the

equivalent of junior matriculation and something more, while in New Brunswick the standard, unless the Committee are misinformed, is scarcely the equivalent of even junior matriculation. Your Committee, without presuming to dictate to the authorities in charge of legal education in these provinces, ventures to direct attention again to the difficulty that such disparity of preliminary requirements is likely to cause for practitioners seeking to move from one province to another, and would repeat the statement in last year's report that uniformity of legal curriculum should not be expected to remove all barriers to the transfer of practitioners. There should also be uniformity in the preliminary education required from a student entering upon the legal curriculum. For there would be obvious unfairness in allowing a student to enter upon and complete even a standard curriculum in a province where the preliminary requirements for admission to study were low and then to transfer to a province where higher preliminary requirements were exacted from its own students. Your Committee notes with satisfaction that the Benchers in Ontario have within the past year raised the standard required from students entering Osgoode Hall from junior matriculation to senior matriculation, and the Benchers of Saskatchewan have done likewise.

Your Committee gave further consideration to the question, debated on previous occasions, of requiring from every candidate seeking admission to practice at least one year of uninterrupted service in the office of a practising solicitor before being called to the Bar. Your Committee decided to make no positive recommendation on this question at this time, although they strongly favoured the view that all students before being admitted to the Bar should be required to attend for not less than three years at an approved law school and that following upon such attendance they should be required to put in at least one year of uninterrupted office practice before being called to the Bar.

Your Committee also considered the question of offering some recommendation in respect of methods of teaching law and particularly as to the advisability of making a larger

use of what is known as the case method of instruction. Your Committee note that more and more the case method of instruction of some modification thereof is being used in Canadian law schools and, without recommending it for general adoption, suggest that teachers in all Canadian law schools give the question of its adoption, partially at least, the consideration which its success in other places seems to warrant.

Your Committee also gave consideration to the question of how uniform teaching material in the way of case books, source books and text books might be made available for the study and teaching of law in Canada. The question is necessarily related to the question of uniformity of methods of teaching and your Committee for the present confines its recommendations to recommending co-operation on the part of those engaged in the teaching of law to the end that duplication be avoided and that books be produced in co-operation or colloboration by such teachers and others which can be used in all the Common Law provinces.

One other matter engaged the attention of your Committee this year and that is the question of post graduate study for students who have completed such a course of study as is indicated by the curriculum recommended by this Association and now so widely adopted throughout Canada. At the present time for students who may seek to prosecute further their legal studies after obtaining their LL.B. degree at a Canadian law school there is no school within the Empire where courses suitable to their needs are furnished. In this connection your Committee were of opinion that if a school were established in London, England, where courses of the kind referred to could be given it would be the best possible solution of the question.

A resolution dealing with the establishment of a great British School of Law at London was prepared and discussed by the Committee and, while the Committee abstained from formally proposing it as a resolution, they felt it might be read to the Association and merely submitted for such action as this meeting might consider wise. The resolution was as follows:

Whereas it is in the opinion of the members of this Association desirable that there should be established a great British School of Law which would be worthy of the legal tradition of the British Empire and would serve as the centre of legal instruction and research for all the British Dominions,

And whereas such a school would be most fittingly established at the ancient home of our Common Law, where the most plentiful records of its past growth and development are to be found, and where it still receives it most authoritative exposition and application,

Therefore be it resolved by this Association that representations be conveyed through appropriate channels to proper authorities and persons in England suggesting the possibility and desirability of establishing at London, England, a British School of Law which would aim to provide complete, thorough and systematic instruction and training in law to meet the needs of students not only from the British Isles but from all parts of the British Dominions;

And in connection with the establishment of such a school, this Association would venture to make the following suggestions:—

Location—That the School be located near the Law Courts at London where students may have daily opportunity of attending the Courts and observing proceedings therein, so that they may not only see how proof is properly made and legal rules ascertained and applied, but also that they may have an opportunity of observing and becoming acquainted with the ethical and professional standards which obtain in those Courts;

Curriculum—That careful attention be devoted to framing the curriculum of the School, to the end that it may be broad enough to cover all branches of the law and thorough enough to ensure adequate preparation for students entering upon the practice of the law;

Staff — That the School be equipped with an adequate staff, sufficient in number to enable each member thereof to become thoroughly master of his subject, and that in creating such a staff an effort be made, with a view of making

it broadly representative, to secure men of the best teaching experience not only from the British Isles but also from the British Dominions and from the United States of America;

Methods of Teaching—That careful attention be given to working out the best methods of teaching to be employed in the School, particular regard being had to the results obtained by the use of the case method of instruction in a number of the leading law schools in the United States of America;

Teaching Material—That it be one of the objects of the School to provide, not only for the use of students at the School but for the use of students at other law schools throughout the Empire, suitable teaching material in the way of case books, source books and text books, especially designed for the use of students;

Research—That special attention be devoted to fostering legal research and the scientific study of legal problems and rules of law, the proper basis for such rules, and that to this end the regular teaching duties of the teachers be not made too onerous, so that they may have time and energy to devote to such research and to directing the conduct thereof by their students;

Teaching Standards—That the School endeavour to establish proper standards of instruction in the various subjects of a law course, with a view to determining the proper content and extent of the various courses of instruction;

Recognition of Overseas Law Schools—That, for the purpose of satisfying the requirements which may be prescribed by the School for its degrees, credit be allowed to students for courses taken at Overseas law schools wherever such courses conform to the standards established by the School;

Special and Graduate Courses — That the School endeavour to give special courses to meet the special needs of students from Overseas Dominions wherever such special courses may be necessary, and particularly graduate courses to meet the needs of students who have completed courses of instruction at Overseas Law Schools.

Lawyers Lyrics

CRACKING HIS SHELL.

With profound apologies to a learned legal author.

(SEE LVII. C.L.J. 284).

How doth the little busy bee!—No, no, I don't mean that,
But how doth the busy lawyer, now and then,
Forsake the rigors of the Law, its mots and precepts pat,
To amuse himself with oddments of the pen.

For instance, here's the grave and reverend author E. D. A.
Whose time we all supposed to be engrossed
In pondering some ancient saw, or quip with time grown gray,
Or wrestling with Coke or Blackstone's ghost.

A'bursting into poetry—Oh Laws! Can this be true?
It is, it is; I've seen it for myself—
Coquetting with the modest Lyric muse till all is blue,
While his legal tomes lie idly on the shelf.

How sweet with coy Enterpe, when the daily task is done,
To toy beneath the spreading linden trees!
To cast aside the tiresome tomes, whereby our bread is won,
And revel in one dignity and ease!

And that our grave and reverend friend has evidently learned;
Subdued by the attractions of his charmer.
Ah! Well! Let us acknowledge that her wreath is fairly earned,
She has clearly found the crevice is his armour.

F. P. B.

London, Ont.

Bench and Bar

DEATH OF TWO GREAT JUDGES.

THE EARL OF HALSBURY.

Perhaps the most striking figure of modern times in the legal world, has passed off the scene at the great age of 98, on 4th December, 1921. Hardinge Stanley Giffard, who was called to the Bar in 1850, soon took a prominent place among his fellows. He took silk in 1860. The next year he was elected Treasurer of the Inner Temple. He was Solicitor General from 1875 to 1880. He sat in Parliament for Launceston, and was Lord High Chancellor from 1895 to 1905. He was Baron Halsbury in 1885 and in 1898 was created an Earl, with the additional title of Viscount Tiverton. He is best known to the profession in these days in his connection with the volumes which bear his name, "Halsbury's Laws of England."

LORD LINDLEY.

Lord Lindley died at Norwich on the same day as Lord Halsbury, aged 93. He was a greater lawyer than the latter, but possessed of the same attractive and forceful personality.

Nathaniel Lindley was the son of John Lindley, Ph.D., F.R.S., Professor of Botany at University College, London, and was born on Nov. 29, 1828. Called to the Bar by the Middle Temple in November, 1850, he was a pupil of Charles Jasper Selwyn, afterwards Solicitor General and Lord Justice. His books no doubt contributed to his success, the first being an "Introduction to the Study of Jurisprudence." His great work on "Partnership," which in its successive editions has held its own without a rival, appeared in 1860. Lindley took silk in 1872, and soon acquired a large practice.

In May, 1875, he was appointed by Lord Chancellor Cairns to be a Justice of the Common Pleas in succession to Huddleston, who was transferred to the Exchequer. On

November 1, 1881, he was appointed a Lord Justice in succession to Bramwell. His judgments possessed much of the excellence, without the massiveness, of the late Lord Watson.

On the resignation of Lord Esher, Lindley was, on October 25, 1897, appointed Master of the Rolls, and on the retirement of Lord Morris was on May 14, 1900, created a Lord of Appeal in Ordinary, with a life peerage under the title of Baron Lindley of East Carleton, in the County of Norfolk. In 1905 he resigned.

We copy from The Times a characteristic sketch of the career of these two great jurists:—

"We announce, with much regret, the deaths, full of years and honour, of Lord Halsbury and Lord Lindley, the two great surviving legal figures of our day. Both were born in the reign of George IV., and both were links with a long-vanished legal past.

Lord Halsbury died in the early hours of Sunday morning. Born on September 3, 1823, he was educated at Merton, and, in 1850, the same year as Lord Lindley, was called to the Bar by the Inner Temple. He chose the Common Law side, and acquired by his eloquence, intellectual quickness, and skill in cross-examination a very large practice. But, unlike Lindley, he was also an ardent party politician, one who never wavered in his allegiance to the pure Tory creed—indeed he may be regarded as the last of the old Tories. In Parliament was a good, but not a great debator, and became in due course Solicitor-General.

Afterwards those who might have been his rivals fell out of the race, and he became Lord Chancellor in 1885, and again from 1886 to 1892 and from 1895 to 1905. Thus he held the Great Seal for a longer period than any other Lord Chancellor or Lord Keeper save only Lord Elden. The expectations of some that he would not prove quite equal to the demands of his great office were signally falsified. Indeed, though he sat constantly with Judges of rare ability, his ascendancy only became more and more marked. Moreover, his influence in politics steadily increased, and he played a great part in the councils of his party, though he never hesitated to reprove it when he thought it weak or wavering. Political courage he had in plenty, and he was never afraid to speak out.

Lord Lindley was no politician, but a great lawyer and a great Judge—indeed, he will take rank among the greatest of the Victorian Age. In length of service he had few rivals; he had the unusual experience of being promoted from the Chancery Bar to the Common Law Bench; he was the last of the Serjeants-at-Law, and the last of those who had ever sat in the historic Court of the Exchequer Chamber."

THE ENGLISH BENCH—CHANGES AND TITLES.

The elevation of Sir Alfred Tristrom Lawrence to the High position of Lord Chief Justice of England was followed by his being created a Peer. This is in accordance with the precedent of the three previous Chief Justices who were elevated to the peerage, Lords Coleridge, Alverstone and Reading, and a discussion has arisen in connection with the above incident. It is also stated that in some ways it is useful for the Lord Chief Justice to be in the House of Lords. The Law Times speaking on this subject says that this practice is strictly in accordance with an almost unbroken custom since the appointment to Chief Justice Murray (Lord Mansfield 1756). The only Chief Justice without a peerage since 1756 has been Sir Alexander Cockburn who repeatedly declined the honour.

In connection with this subject it occurs to us to mention that it would be a convenience to the public and save some search to have at least all life peerages under the surname of the appointee. After the lapse of a very short time the identity of some one well known to the profession and the public is lost by his taking a title which indicates nothing as to his former career. For example why should we have to enquire who Lord Birkenhead was? We all knew him by the good old honest name he bore in previous years. Why should we not know without enquiry that the Viceroy of India once bore a name honoured by the Hebrew race, which had nothing to do with the Town of Reading. Even lawyers cannot be expected to remember everything.

Book Reviews

Principles of Contract: A treatise on the general principles concerning the validity of agreements in the law of England. By The Right Hon. Sir Frederick Pollock, Bt., K.C., D.C.L., of Lincoln's Inn; correspondent of the Institute of France; Associate of the Royal Academy of Belgium; Honorary Fellow of Trinity College, Cambridge, and Corpus Christi College, Oxford; Honorary Doctor of Laws in the Universities of Paris, Edinburgh, Dublin, Harvard and Christiania. Ninth Edition. 1921. London: Stevens and Sons, Limited, 119 and 120 Chancery Lane; Canada Law Book Company, 84 Bay Street, Toronto, Sole Agents for Canada.

As the author says in his preface, many changes will be found in this edition; and this is an expected event on account of the late war. This remark applies with special force in connection with the impossibility of performance of contracts. The cases are collected in the index under the heading "Frustration"; a somewhat new word in this connection, but singularly appropriate in these days of destruction and negation. This subject is referred to at some length in the preface as well as in various places in the body of the work. A study of it is a new source of interest to those who keep track of developments in the law of contracts.

Anything from the pen of this great jurist, Sir Frederick Pollock, is of recognized weight and importance in all circles interested in the interpretation of the law; and in this volume every help is given to the reader in the shape of an interesting Preface, a full Table of Contents and of Cases Cited and that most necessary thing, a copious, comprehensive and scientific Index.

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EFFECT OF THE EXPRESSION "IN TRUST" IN A CONVEYANCE.

A case of great interest to real property owners came before our Courts in the year 1919. Re McKinley and McCullough, 51 D.L.R. 659, 46 O.L.R., p. 535.

Its nature and the final decision of the Court of Appeal are best indicated by the following extract from the head-note of the reported case:—

"In a conveyance of land, dated 1st May, 1888, from C. to T., the words "in trust" followed the name and description of the grantee: but there was nothing in the Conveyance and nothing registered to shew what the trust was. Subsequently T. sold and conveyed the land, the deed from him giving no indication of what the trust was, and the title came through intermediate purchasers and under registered conveyances to McK., who agreed to sell to McC. The latter considered that he should not accept the title without some evidence that, as trustee, T. had a right to sell and convey. McK. was unable to furnish any evidence of what the trust was. It was thereupon held upon an application under the Vendors and Purchasers Act, that only actual notice will affect a purchaser whose conveyance is registered, that the notice which the conveyance to T., by the use of words "in trust," gave was constructive notice only, and that the subsequent registered owner was therefore not affected by it."

It may be remarked that the above report is somewhat misleading, in so far as it seems to convey the idea that there was no actual notice of the trust. For the purpose of arriving at a true appreciation of the point involved in this case, it is, it seems to us, important to distinguish two quite different ideas.

It will be observed that the words "notice of the trust"

in the above sentence are capable of a double meaning. They may mean either (a) Notice that T., the grantee in the above mentioned Conveyance took the land as trustee, or (b) notice of the terms of the trust upon which T. took the land.

It seems quite clear that everyone dealing with the title of this land subsequent to the registration of the above-mentioned deed had actual notice of the fact that T. took the land merely as trustee.

That seems to be admitted in the judgments both of Mr. Justice Middleton in the Court below, where the words are (page 537): "Here all that the registered owner had notice of is the fact that Turner who bought in 1888 and sold shortly thereafter was in fact a trustee," and also of Chief Justice Meredith in the Court of Appeal where the following words occur, page 540: "Now the purchasers subsequent to the conveyance had actual notice not of any instrument declaring or evidencing a trust but only, at the most, that the land was conveyed to the grantee in trust."

The case was dealt with by, in all, six Judges, of whom five, including Mr. Justice Middleton in the Court below, were of the opinion that the vendor was entitled to force the title upon the unwilling purchaser.

Mr. Justice Magee in the Court of Appeal alone entertained a different opinion.

The point is one which by reason of its frequent occurrence in Ontario titles is of unusual importance.

We confess that, were it not for the very great weight which attaches to the opinion of the eminent jurists who coincide in decision in this case, we should have been inclined to consider the view expressed by Mr. Justice Magee as the correct one.

We should have been inclined to think that the Registry Act which is extensively quoted in the judgments does not help the matter.

It does not seem to us to be a question of excluding or nullifying an equitable interest by a subsequent registered deed, but rather of whether a certain grantor in the chain

of title had power to sell and convey the fee simple (legal and equitable) as he has purported to do.

It will be admitted that the word "trustee" is equivocal, so far, that is, as indicating what powers of sale and alienation are vested in the person so defined. Until the terms of the trust are known it is impossible to say whether the trustee has or has not power to sell and convey. The mere fact that land is conveyed to A as trustee therefore means that A's position is as follows, namely, either that of (a) a trustee with power to sell, or (b) a trustee without power to sell.

Now if that is the case, and if, as in the present case all that is known is that the land is conveyed to A as trustee, surely the purchaser has the right to say "Prove to me that A occupied the former and not the latter of the above positions before asking me to accept the title."

As the matter stands there is, it seems to us, no more reason for assuming in the present case that T occupied the first mentioned position than the last mentioned.

And yet that seems to be what the Court of Appeal have done by their judgment.

They have apparently assumed in favour of the vendor that when T executed the deed in question he had the power to do so, so as to pass the fee (legal and equitable) to the purchaser, a power he could not have unless it were conferred on him by the terms of the trust. In other words the Court seems to have supplied the missing trust by assuming that it included in its terms power to the trustee to sell and convey.

One would, it seems to us, with all possible deference to the learned Judges who have spoken, have been inclined to suppose that if a proposition of that kind was to be put forward, the onus of proving it would be upon the vendor asserting it, and that in the absence of such proof he would not be entitled to compel the purchaser to accept the title.

We think Mr. Justice Magee puts the case very fairly when he says, p. 542, "The matter must, I think, be looked at just in the same light as if Turner were now alive, and

as if he were now the vendor and seeking to force the title upon the purchaser without any explanation of the nature of the trust. The lapse of thirty years may render it improbable that any claim under the trust, whatever it was, exists, but it does not alter the law as to whether such a title could at any time be forced upon a purchaser without more."

On the law, as it at present stands, as established by the case under discussion, it would seem that the following might very well occur.

A, who received the land as trustee sells to B. B's solicitor says, "I shall make no inquiry as to the terms of the trust. I shall not even enquire whether A has power to sell—I shall only see that the purchase money is not paid until the deed from A is actually registered. Then my client will be absolutely safe."

It is true that in the judgment of the Court of Appeal some stress is laid upon the fact that there had been a considerable lapse of time since the execution of the deed in question, but the judgment does not seem to depend upon that fact.

The case of London and Canadian Loan and Agency Company v. Duggan (1893) A.C. 506, which is the authority chiefly relied on by the Court, seems to differ in important particulars from the present.

Indeed Mr. Justice Magee does not seem to put the matter too strongly when he says, p. 545, "That case I would consider a strong authority in favour of the purchaser here that there is notice that Turner held in trust for some one else, and that a purchaser is put upon inquiry as to his right to sell."

The position there seems to have been that, while the parties were undoubtedly put upon their enquiry by the words "manager in trust" there used, any obligation so raised to enquire into the nature of the trust was satisfied by the presumption arising from the words employed, viz., "manager in trust" which, as said by Lord Watson (p. 509) "according to their natural construction" imported that the official in question held in trust for his employers, and

as Mr. Justice Magee says (p. 544) "were not calculated to suggest that he stood in a fiduciary relation to any other person."

Here the exact opposite is the case. The words "T, in trust" indicate clearly that T is a trustee only, and there is nothing whatever to indicate the beneficiary or the nature of the trust.

The obligation to enquire therefore which in the Duggan case was held to be satisfied, is here wholly unsatisfied.

Mr. Justice Kelly in the case of Re Thompson and Beer (1919), 17 O.W.N. 4, in which the circumstances are precisely similar to the present case, delivered what seems to us to be a very admirable judgment in the following words, "The use of the word 'trustee' after her name, in the conveyance to her, was notice to subsequent purchasers that she took in the capacity of trustee. A purchaser is entitled to proof of the nature and extent of the trusts on which she took, and who are the cestuis que trust or persons otherwise interested, and whether these trusts include a power to sell either by herself or with the consent of others or otherwise; and, if the terms of the trust confer a power of sale, he may insist on proof that it is properly exercised."

Mr. Justice Magee, at p. 542, has very aptly pointed out the dangers which may attend a dubious title of this character, "All this would be quite consistent with the existence of a very simple trust giving rise to no occasion for claim or question during the life of someone yet living—so that the absence of claim affords no assurance of the non-existence of a very substantial right. On the other hand, of course, the trust, if any, may have been a trust to sell."

It is of course obvious that at the time the deed was made there must have been someone interested as cestui que trust in the land—possibly more than one. If after this title has been forced upon the present purchaser, one or more of these persons should see fit to endeavour to enforce their rights by an action, the purchaser would of course be put to the trouble and expense of defending his title. If such a thing should occur, it would seem rather

a hardship on the purchaser, who had protested on this very ground against being compelled to accept the dubious title.

It will of course be borne in mind that the position is not by any means the same as though the ownership or the title of the vendor were being attacked by a stranger.

The question under the present case is simply whether the title that the vendor has is such a one as the Court will force on an unwilling purchaser.

In regard to this position we might refer to the first of the rules laid down by the late Vice Chancellor Turner in the well known case of Pyrke v. Waddingham, 10 Hare 8 (approved by Lord Romilly in Mullings v. Trinder, L.R. 10 Eq. 449), as resulting from the authorities on the subject, viz.:—

"That the Court will not hold a title to be good, even though its now opinion may be favourable, when other competent persons might reasonably entertain a different opinion, or when the purchaser, if compelled to take the title, might be exposed to substantial and not merely idle litigation; and that in determining each case, it must not be lost sight of that the Court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion should turn out not to be well founded; and that in cases where the title may be affected by rights which may hereafter arise, it is the duty of the Court to act as if those rights had actually arisen and were in the course of active litigation."

We think it cannot but be admitted that serious uncertainties attach to the title of the vendor in the present case.

One can easily conceive circumstances under which the title of the vendor would be undoubtedly bad, for instance, suppose that, at the time the deed in question was made to T, another deed was also executed, declaring the trusts on which T. was to hold the property.

Suppose the property were to be held in trust for A, for life, and after his decease in trust for B in fee. Suppose A were to die within a year or two of the present time, and

B were to bring an action to recover the land; suppose moreover that, in that action, B were to prove that, at the time the deed in question was executed, T had actual notice of the Trust Deed and its contents, and that all the subsequent grantees of the land to the present time had similar notice. As the Registry Act is of no avail as against actual notice, it would seem that B must succeed in his action. The result would be that the present purchaser, who has protested to the extent of his ability against having this dubious title forced upon him, would lose his land in toto.

It may be said that the probability of the occurrence of the suppositious case above mentioned is extremely remote, but the position of the purchaser, of course, is that he should not be compelled to assume any risk whatever in the matter, however remote.

On the whole the present judgment seems to carry the law upon the matter distinctly beyond any previous decision.

London, Ontario.

F. P. BETTS,

UNIFORMITY OF LEGISLATION.

The excellent work done by the commissioners and representatives of the Provinces of Canada for the purpose of promoting uniformity of legislation in Canada appears in the report of the proceedings of that body as presented at their fourth annual meeting.

This Commission which is really a child of the Canadian Bar Association has adopted a title similar to that given to a similar branch of legal service in the United States, viz., The National Conference of Commissioners on Uniform State Law. It is unnecessary to dilate upon the importance of this subject; it is recognised by all. A sketch of objects and methods and a summary of what has been done appears in the Report of proceedings and is as follows:—

The independent action of the various provincial legislatures naturally results in a certain diversity of legislation. In some cases diversity is inevitable, as, for instance, when

the Province of Quebec legislates upon subjects within the purview of the Civil Code of Lower Canada and according to principles derived from the old law of France, and the other provinces legislate upon similar subjects according to principles derived from the common law of England. In such cases the problem of securing uniformity is confined to the common law provinces. There are, however, many other cases in which no principle of either civil law or common law is at stake, with regard to which the problem of securing uniformity is the same in all the provinces. Both these classes of cases include subjects of legislation as to which it is desirable, especially from the point of view of merchants doing business in different parts of Canada, that legislation should be made uniform throughout the provinces to the fullest extent possible.

In the United States work of great value has been done by the National Conference of Commissioners on Uniform State Laws. Since the year 1892 these commissioners have met annually. They have drafted uniform statutes on various subjects, and the subsequent adoption of these statutes by many of the state legislatures has secured a substantial measure of uniformity. The example set by the state commissioners in the United States was followed in Canada when, on the recommendation of the Council of the Canadian Bar Association, several of the provinces passed statutes providing for the appointment of commissioners to attend an interprovincial conference for the purpose of promoting uniformity of legislation.

The first meeting of commissioners and representatives of the provinces took place at Montreal on the 2nd of September, 1918, and at this meeting the Conference of Commissioners on Uniformity of Legislation in Canada was organised. The second annual meeting of the Conference took place at Winnipeg on the 26th, 27th, 28th and 29th of August, 1919, the third at Ottawa on the 30th and 31st of August and the 1st, 2nd and 3rd of September, 1920, and the fourth at Ottawa on the 2nd, 3rd, 5th, 6th, 7th and 8th of September, 1921.

In 1919 the Conference considered and adopted a report on legislative drafting, containing a carefully prepared

selection of extracts from books written by the leading authorities on the subject, and directing attention to many important rules to be observed by draftsmen of statutes.

In 1919 and 1920 the Conference secured the adoption of the Sale of Goods Act, 1893, and the Partnership Act, 1890, in those common law provinces which had not already adopted them, and these two codifying statutes are now in force in all the provinces of Canada except Quebec.

In 1920 the Conference revised and approved model uniform statutes relating to legitimation by subsequent marriage and to bulk sales.

In 1921 the Conference revised and approved model uniform statutes respecting fire insurance policies and warehousemen's liens.

Draft statutes relating to conditional sales, reciprocal enforcement of judgments and life insurance have been considered by the Conference, and it is hoped that in 1922 model uniform statutes on these subjects will be revised and approved.

Other subjects which have been considered by the Conference or which have been referred to committees for report are: companies, devolution of estates, wills, succession duties, mechanics' liens, workmen's compensation for injuries and fraudulent conveyances.

Statutes have been passed in some of the provinces providing both for contributions by the provinces toward the general expenses of the Conference and for payment by the respective provinces of the travelling and other expenses of their own commissioners. It is hoped that similar statutes will be passed by the other provinces. The commissioners themselves receive no remuneration for their services.

It seems desirable to direct attention to the fact that the appointment of commissioners does not bind any province to accept any conclusions arrived at by the Conference, and that such uniformity of legislation as may be secured by the labours of the Conference will depend upon the subsequent voluntary acceptance by the provincial legislatures of the recommendation of the Conference.

CHEQUES AND PITFALLS.

It is an interesting event for a budding financier of the legal or any other fraternity and one that gives him a sense of importance to open a bank account and handle a cheque book; but we would warn him that there are pitfalls on the road to opulence which must be avoided.

Firstly as to issuing cheques. It is scarcely necessary to say that it is not desirable to give a cheque unless there is money to the credit of the drawer's account—carelessness in this respect has landed men in a Police Court on a charge of fraud. Issuing a cheque to pay a debt when there are no funds or not sufficient funds to meet is not necessarily a fraud. There may not have been any fraudulent intent (see Crim. Code. sec. 404), but serious consequences might result. If the drawer had no account at the bank named in the cheque fraudulent intent would be hard to displace. In a recent case there was a conviction by a Police Magistrate who seemed to think that the simple act of giving a cheque when there were no funds to meet it was a fraud and the careless youth who did it was convicted. The Magistrate was wrong in his law as there was shown to be a reasonable excuse, but the offender saw the inside of a prison all the same.

A different pitfall is dug for a novice when the holder of a cheque delays the presentment of it. This feature of the law affecting cheques is discussed in a recent number of our English contemporary The Law Times as follows:—

Delay in Presenting Cheques.

"Persons who cash cheques for friends who have no banking accounts—which might be described as an everyday occurrence—should make a point of presenting such cheques without delay, otherwise they may find themselves unable to recover the money paid. A cheque is a bill of exchange drawn upon a banker, payable on demand (Bills of Sale Act 1882, s. 73), and should be presented within a reasonable time of its issue. What is a reasonable time is a question of fact in each case, regard being had to the nature of the instrument, the usage of trade and of bankers,

and the facts of the particular case: (Ibid., s. 74 (2). In most cases more than a day or two should not be allowed to elapse. If there is unreasonable delay in presenting the cheque, the drawer, if he had funds to meet it at the bank on which it is drawn, is discharged from liability upon it if in the meantime the bank suspends payment, and the payee's only right is to prove as a creditor against the bank. He cannot ask the drawer to make good his loss. His own negligence is the cause of it: (Ibid., s. 74 (3). It does not follow from the above that a cheque has no value if not presented within a reasonable time. It can be cashed any time within six years if nothing has happened to the bank and the drawer is solvent, because the drawer sustains no damage by delay, as it is his duty to have enough to his credit to meet all cheques drawn by him: (Robinson v. Hawksford, 1846, 9 Q.B. 52). There would, however, be considerable danger in cashing a stale cheque for the holder apart from the drawer's or the banker's insolvency, because anyone doing so is deemed to have notice of all defects in title attaching to it, and it might have been stolen. Bankers generally refuse to cash stale cheques although their right to do so has never been judicially sanctioned. If a cheque is not presented within a reasonable time the drawer is liable on the cheque, but not on the original consideration—that is to say, if one accepts a cheque in payment of a debt due to him from the drawer and does not cash it promptly, the debt is discharged and he can only sue on the cheque. If the cheque be indorsed in favour of someone who pays cash for it and that person unduly delays presenting it, and when he does present it it is dishonoured, he loses his money as the indorser is discharged by the delay: (Ibid., s.. 45 (2). The person cashing the cheque is supposed to have given the money for it knowing that if he delayed in presenting it he might be the loser, and he has no legal remedy against the person he obliged. If he had presented the cheque without delay, he could on its being dishonoured have sued the indorser or the drawer after serving prompt notice of dishonour."

CRIMINAL RESPONSIBILITY FOR NEGLIGENCE IN MOTOR CASES.

The invasion of our roads and streets by motor vehicles of every sort and description and for all purposes of travel and traction has brought in its train litigation both civil and criminal.

One of these cases, The King v. McCarthy, reported fully in 59 D.L.R. 206, was carried to the Supreme Court of Canada from the Saskatchewan Appellate Court and will be found in 61 D.L.R. at p. 170. The finding of the Supreme Court was to the effect that a person driving an automobile on a public street is under a legal duty to use reasonable care and diligence to avoid endangering human life. If he fails to perform that duty without lawful excuse he is criminally responsible for the consequences.

This liability would seem to be so obvious as not to require a judicial pronouncement. It served however to bring forth a collection of authorities on the subject, which will be found in the following annotation in a recent number of the Dominion Law Reports which reads as follows:—

The first statutory enactment in Canada declaring the criminal responsibility of persons in charge of dangerous things was that contained in the Criminal Code of 1892, (Can.), ch. 29, sec. 213. That section was carried into the Criminal Code of 1906 as section 247, and reads as follows.—

"247. Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."

This enactment appears to have been intended to declare the criminal liability already existing at common law. Sir James Fitzjames Stephen in his Digest of the Criminal Law of England states the related proposition based upon the common law as follows:—

"It is the legal duty of every one who does any act which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it." Stephen's Digest of Criminal Law, 6th ed., article 237.

Sec. 247 of the Criminal Code declares criminal responsibility for the consequences of omitting to take reasonable precautions against and to use reasonable care to avoid endangering human life, provided the omission so to do is without "lawful excuse."

Secs. 16 to 68, inclusive, of the Criminal Code, 1906, deal with matters of justification and excuse. By sec. 16 "All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith."

The common law is not abrogated by the Code, and will still be applicable in cases for which no provision has been made in the Code as well to their prosecution and defence. Even in cases provided for by the Code the common law jurisdiction as to crime is still operative except where there is a repugnancy in which event the Code will prevail. R. v. Cole (1902), 5 Can. Cr. Cas. 330, 3 O.L.R. 389; R. v. Walkem (1908), 14 B.C.R. 1 at p. 7.

Culpable homicide, not amounting to murder, is manslaughter. Cr. Code sec. 262.

And, with certain limitations as to the time of death being within a year and a day of the cause of death (Cr. Code sec. 254), homicide is culpable when it consists (inter-alia) in the killing of any person by an omission without lawful excuse to perform or observe any legal duty. Cr. Code sec. 252. The legal duty referred to is presumably a duty qua the criminal law which is the subject of the Code and does not refer to such civil rights as are, in general, outside of the legislative jurisdiction of the Dominion Parliament and are delegated to the legislative control of the Provincial Legislatures by the British North America Act 1867 Imp., ch. 3.

The decision in the McCarthy case, supra, affirms in the result the majority opinion of the Saskatchewan Court of Appeal; see R. v. McCarthy (1921), 57 D.L.R. 93, 14 Sask.

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L.R. 145. It may be taken as establishing that there was no substantial wrong or miscarriage in the direction by the trial court that in a criminal case the degree of negligence which renders a man culpably negligent is greater than in a civil case; but while so affirming the result in the trial court and in the Saskatchewan Court of Appeal, some of the opinions in the Supreme Court of Canada contain dicta which would support the proposition that there is no such difference between negligence involving criminal responsibility and negligence which results in civil responsibility at least in the Province of Saskatchewan which was the jurisdiction appealed from. The questions of criminal responsibility becoming enlarged or diminished under Cr. Code sec. 247 because of differences in the various provincial laws dealing with civil negligence was not considered. The reference to "reasonable" precautions in Code sec. 247 gives room for much difference of opinion as to the scope of criminal responsibility and as to how far the question of reasonableness of the precaution or care referred to in Code sec. 247 may, on the one hand, be a question of fact only for the jury and, on the other hand, a question of law for the court.

The development of the Criminal Code of Canada (with the exception of the practice clauses) from the draft English Criminal Code which did not become law in England, tends to show that Code sec. 247 was framed solely with reference to the criminal responsibility under the English common law as applied to crimes, and that it may be treated as a definition of what is sometimes termed "gross negligence" and sometimes "negligence per se" in the criminal courts.

Carelessness is criminal and, within limits, supplies the place of direct criminal intent. Bishop on Criminal Law 313.

In Sir James Fitzjames Stephen's History of the Criminal Law of England (1883) it is said in reference to manslaughter by negligence that the legal and popular meanings of the word are nearly identical as far as the popular meaning goes; but in order that negligence may be culpable "it must be of such a nature that the jury think that a person who caused death by it ought to be punished; in

other words it must be of such a nature that the person guilty of it might and ought to have known that neglect in that particular would, or probably might, cause appreciable positive danger to life or health, and whether this was so or not must depend upon the circumstances of each particular case." Vol. 2 Stephen's History of Criminal Law, p. 123.

Although it is manslaughter, where the death was the result of the joint negligence of the prisoner and others, yet it must have been the direct result wholly or in part of the prisoner's negligence, and his neglect must have been wholly or in part the proximate and efficient cause of the death, and it is not so where the negligence of some other person has intervened between his act or omission and the fatal result. R. v. Ledger (1824), 2 F. & F. 857.

If a person is driving a cart at an unusually rapid rate, and drives over another and kills him, he is guilty of manslaughter though he called to the deceased to get out of the way, and he might have done so, if he had not been in a state of intoxication. Reg. v. Walker (1862), 1 C. & P. 320.

In the application of the English common law, the prevailing rule is to exclude contributory negligence on the part of the deceased as an excuse in a criminal case. Reg. v. Jones (1870), 11 Cox C.C. 544, disapproving Reg. v. Birchall (1866), 4 F. & F. 1087; Reg. v. Swindall (1846), 2 Cox, C.C. 141; Reg. v. Dant (1865), 10 Cox C.C. 102; Reg. v. Hutchinson (1864), 9 Cox C.C. 555.

And in a recent Canadian case it was held that contributory negligence is no defence to the criminal prosecution under Cr. Code secs. 247 and 284, of a light and power company for causing grievous bodily injury by omitting without lawful excuse to take reasonable precautions against endangering human life in the care of the company's electric wires, R. v. Yarmouth Light and Power Co. Ltd. (1920), 56 D.L.R. 1, 53 N.S.R. 152, 34 Can. Cr. Cas. 1, and see annotation to that case, 56 D.L.R. at p. 5.

In cases of homicide the rule is established in many of the United States that one who wantonly or in a reckless or grossly negligent manner does that which results in the death of a human being, is guilty of manslaughter although

he did not contemplate such a result. Commonwealth v. Hawkins (1893), 157 Mass. 551, 553, 32 N.E. 862. His gross negligence in exposing another to personal injury by intentionally doing the act, makes his intention criminal. Commonwealth v. Hawkins, supra; Banks v. Braman (1905), 188 Mass. 367, 74 N.E. 594.

Criminal negligence is sometimes referred to as negligence per se. Such negligence has been defined as "the omission to do what the law requires or the failure to do anything in the manner required by law." Babbitt's Law of Motor Vehicles, 2nd ed., sec. 954; St. Louis, etc., Ry. v. Keokuk (1887), 31 Fed. Rep. 755, at p. 756.

"Negligence per se" has been described as an act or omission which the law has commanded or prohibited, the occurrence of which is, of itself and independent of its result, as matter of law declared a failure of duty rendering the culprit liable to public punishment, and this irrespective of all questions of the exercise of prudence, diligence, care or skill in case a fellow being is injured. Thompson Commentaries on Negligence, 2nd ed., secs. 10, 204; Babbitt's Law of Motor Vehicles (1917), 2nd ed, sec. 955; Cecchi v. Lindsay (1910), 1 Boyce 185 (Del.), 75 Atl. 376; Robinson v. Simpson (1889), 8 Houst. 398 (Del.), 32 Atl. 287.

"When the imperfection in the discharge of duty is so great as to make it improbable that it was the result of mere inadvertence, then in proportion to such improbability does the probability of negligent injury diminish and that of malicious injury increase." Wharton on Negligence, 2nd ed., sec. 22.

If one is grossly and wantonly reckless in exposing others to danger, the law holds him to have intended the natural consequences of his act, and treats him as guilty of a wilful and intentional wrong. It is no defence to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury, there is a constructive intention as to the consequences which, entering into the wilful intentional act, the law imputes to the offender in this way a charge which would be mere negligence becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. Banks

v. Braman, 188 Mass. 367, 74 N.E. 594. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognised as an elementary principle in criminal law. Banks v. Braman, supra; and see Commonwealth v. Pierce (1884), 138 Mass. 165; Commonwealth v. Hartwell (1880), 128 Mass. 415; Bjornquist v. Boston & Albany Railroad (1904), 185 Mass. 130, at p. 134.

If the operator of a motor vehicle, with reckless disregard for the safety of others, so negligently drives his vehicle in a public highway as to cause the death of a person thereon, he is guilty of criminal homicide. Davids' Law of Motor Vehicles (U.S.A. 1911), sec. 237; State v. Goetz (1910), 83 Conn. 437, 76 Atl. 1000; State v. Campbell (1910), 82 Conn. 671 at p. 677, 74 Atl. 927, 135 Am. State Rep. 293.

Individuals as well as corporations, in the use and operation of dangerous machines, should have a due regard to the preservation of the rights of the public in the use of the public streets, as well as the protection of persons using such streets from injury; and if they fail in this and should in the operation of a vehicle which is always attended with more or less danger negligently, carelessly and recklessly destroy human life, it is but in keeping with the proper and impartial administration of justice, that penalties should be suffered for the commission of such acts. State v. Watson (1909), 216 Mo. 420, 115 S.W. Rep. 1011, at p. 1015.

THE LAW RELATING TO THE AIR.

O. M. Biggar, K.C.

The legal problems presented by the navigation of the air have for some time been the subject of consideration, although it is only very recently that they have become of practical importance, and even yet very few cases have arisen involving their discussion in Court. The balloon was discovered by the brothers Montgolfier only in 1783, and although during the next century ballooning under-

went considerable development, it was not until after the beginning of the twentieth century that the development of gas engines of large power and small proportionate weight has permitted the purposeful navigation of the air. The airship has come into existence, and, serious accidents notwithstanding, the highest hopes are entertained of its ultimate wide usefulness, though it is rather to the aeroplane that public attention has been directed. It was only in 1903 that men first left the earth supported by an apparatus displacing less than its weight of air, and Bleriot's famous flight across the Channel only thirteen years ago is still fresh in everybody's memory. Perhaps public attention has been rather attracted to the heavier-than-air machine by its striking use during the war, which doubtless altered the direction of the development of air navigation. It is said that *inter arma leges silent,* but the statement contains only a half-truth. So far as air navigation is concerned the law did intervene in the war, but only to prohibit civil flying, with the result that the war's conclusion found a developed air interest with which it was necessary for the law to deal not merely negatively but constructively. Last summer there were in Canada twenty-nine commercial companies owning or operating aircraft, and in addition the Air Board was, with great success, carrying out surveying, patrol and other operations for purely administrative purposes with twenty-four machines operated from six stations, of which the most westerly was Vancouver and the most easterly Halifax. The number of commercial companies interested in aviation has since slightly increased.

The legal problems air navigation presents are primarily divisible into two classes: those which relate only to municipal and those which relate to international law. It will be convenient to consider the first class independently of the provisions of the Convention relating to International Air Navigation, although these have an important bearing upon purely domestic legal problems. All that is necessary to say at this point is that while before 1914 the fundamental question of national jurisdiction over the air space had been the subject of debate both by diplomatic and

international juridical bodies, and an early attempt at an international air convention had failed by reason (as I was told in Paris) of the denial by Great Britain that national sovereignty extended to the air, the proposition that every Power has complete and exclusive sovereignty over the air above its territory is now generally conceded.

In a country with a federal constitution it is necessary at the outset to consider whether the sovereignty so established is exercisable by the federal or by the provincial or state authorities, and this question has been much debated in the United States. It presents, however, little difficulty in Canada. The necessity for governmental interference on any cognate subject did not exist in 1867, and in the absence of any subject of exclusively provincial legislation expressed in section 92 and necessarily including the use of the airways, that subject would fall within the residuum of powers given to the Dominion. Even the residuary clause need not, however, be alone relied on. The tenth of the classes of subjects allotted to the Dominion, namely, navigation and shipping, seems clearly to include it. The air is like the sea in pathlessness. In its relation to land surface it perhaps approximates more closely to a navigable river, but control of the use of both has, so far as legislative jurisdiction in Canada is concerned, been confided to the Dominion. There appears to be no reason for refusing to extend the application of the words of the British North America Act to include everything comprehended within their common signification, and the common terms relating to navigation have all been applied to the navigation of the air with the same meanings as they bear in relation to the navigation of the waters of the earth. Even if neither the residuary powers of the Dominion nor the words "navigation and shipping" were sufficient to confer jurisdiction over the air on the Dominion, section 132 of the British North America Act, conferring upon the Dominion all "powers necessary or proper to performing the obligations . . . arising under Treaties between the Empire and . . . foreign countries," would, as it will appear later, in view of the ratification of the Convention relating to International Air Navigation, give wide powers to the Dominion.

The next question of outstanding importance is the relation between the rights of navigators of the air and the rights of the owners of the ground over which they fly. Heretofore the law has been concerned with the rights of men in the use of the surface of the earth. During the process of the definition of those rights in the development of the English common law the maxim *cujus est solum ejus est usque ad coelum* has been laid down and applied. The maxim itself is first found in Coke (1) who cites in support of it three cases from the Year Books, of which the earliest is in 22 H.VI., and the latest in 14 H.VIII. In the most important of them (2) a landlord who had reserved the woods and underwoods was held not to have reserved the "herons and shovelers" nesting in them, but, on the contrary, that the lessee took in height all the air which nourished the trees and all the profits which came from them. The limitation upon the height to which the rights extended is not without significance. The rule, however, was stated in its broadest terms by James, V.C., in 1870 (3). He said "The ordinary rule is that who ever has got the solum—whoever has got the site—is the owner of everything up to the sky and down to the centre of the earth." His statement of the rule was made, however, for the purpose of giving effect to a partial exception from it, while in 1884, Brett, L.J., referred to the extension of a surface owner's rights to the centre of the earth as being a "fanciful phrase" and added that "usque ad coelum" was to his mind "another fanciful phrase" (4). In the same case Bowen, L.J., said he would be loath to suggest or to acquiesce in a suggestion that an owner of land has not the right to object to anyone putting anything over his land at any height in the sky, but his emphasis is upon the word "putting" which seems to involve the idea of construction and permanency, rather than the use of the air for support

(1) Co. Litt. 4a.

(2) 14 Hy. VIII., 12.

(3) Corbett v. Hill (1870), L.R. 9 Eq. 671.

(4) Wandsworth Board of Works v. United Telephone Co., (1884) 13 Q.B.D. 904, at p. 915.

in navigation or rights of ownership extending upwards indefinitely into space. Indeed it is only when "coelum" is supposed to connote a definite limiting blue vault that the phrase *usque ad coelum* can be given any meaning, and since the suggested connotation is admittedly false some further explanation and definition of the maxim is obviously necessary. Broom's translation of it is "He who possesses land possesses also that which is above it." Possession, however, involves control, and the statement is certainly not true of the air which blows across the land as wind. Moreover, projections from adjoining lands appear always to have been dealt with rather as interferences with user than as giving rise to any possessory rights. Momentary interferences with rights of ownership, such as for example, shooting across a parcel of land (1) seem equally to be properly regarded as interferences with user. There are indeed no cases in any books extending the rights of an owner of the surface beyond the space above it necessary to its reasonable use.

On the other hand, Lord Ellenborough in 1815 (2) said: "I do not think it is a trespass to interfere with the column of air superincumbent on the close. If this board overhanging the plaintiff's garden be a trespass it would follow that an aeronaut was liable to an action *quare clausum fregit* at the suit of every occupier of a field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded." His remark was fifty years later referred to by Blackburn, J., in the course of an argument as "the old query of Lord Ellenborough as to a man passing over the land of another in a balloon," and he added, "I understand the good sense of that doubt, but not the legal reason of it." (3) Lord Ellenborough's denial of the importance of the element of

(1) Clifton v. Bury (1887), 4 Times L.R. 8; Whittaker v. Stangwick (1907), 100 Minn. 386. See also Ellis v. Loftus Iron Co. (1874), L.R. 10, C.P. 10; Hannablson v. Sessions (1902), 116 Iowa 457.
(2) Pickering v. Rudd (1815), 4 Campbell 219.
(3) Kenyon v. Hart (1865), 6 B. & S. 249, at page 252.

time may be open to criticism, but it is simpler to confine the rights of the surface owner to that portion of the superincumbent space which he may conceivably make use of with the surface.

We then reach a situation not unlike that of the owner of land on the bank of a navigable river, and parallels exist between the rights of such an owner in respect of the water of the river and the rights of the owner of any land to the air in passage over it. For example, the one is entitled to have the water and the other the air come to him unpolluted. It is not difficult to extend this analogy and to assimilate the rules of law relating to the use of the air spaces for passage to those which govern the use of a navigable river. The owner of land on the bank of a navigable river, like the owner of land abutting on a public road, has the right to compel a reasonable use of the highway. Jessel, M.R., in an action (1) for an injunction to restrain the owner of a wharf from permitting to tie up at the wharf a ship of such a length that she projected in front of the adjacent property, refused the injunction on the ground that the user in question was in fact a reasonable user of the river, and referred to the case of a carriage stopping at one of two adjacent front doors. Such a stoppage was in itself, as he pointed out, without question a reasonable use of the highway, notwithstanding that the adjacent front door might be momentarily blocked. Equally, it was not unreasonable for the carriage to wait, but if, while waiting, the adjacent owner drove up, it was the duty of the waiting carriage to give him place, and a refusal would make the user of the highway unreasonable. The question, he said, was, in all cases, one of the reasonableness of the conduct in question. Thus it has been held in England that cattle grazing on a public highway may be restrained damage feasant (2); that a plaintiff using a highway to interfere with a pheasant drive has no action if he is forcibly prevented from doing so (3), and that a racing tout has no right to use a highway for the purpose of spying upon a running of race horses upon the land of the adjacent owner (4). None of these forms of user are reasonable,

having regard to the purposes of the highway, which is for passage and for all that that implies, but for no other purpose.

Apart altogether from statute, therefore, it would appear reasonably clear that the law is not inadequate to insure the proper user of the air for navigation of aircraft, or to protect the right of the surface proprietor to the peaceable enjoyment of the surface, including of course in the expression "surface" such an area immediately above the ground as can reasonably be made use of by men supported directly or indirectly upon it. There is no difficulty in insisting that, apart from statute, a landowner could prevent by injunction, or recover damages for, the unreasonably low flight of an aircraft or its hovering unreasonably above his land.

The point just discussed has not, in England, been left to forensic discussion and determination. The Air Navigation Act, 1920, contains a very long section (5) providing, to begin with, that no action shall lie in respect of the flight on an aircraft at a reasonable height above the ground, having regard to all the circumstances of the case. But it also deals with another aspect of the subject. No aircraft can take the air or leave it without making use of land or water surface, and the force of gravity may on occasion result in interference from the air with the rights to the surface. Such interference may be due to stress of weather, to accident resulting in the fall of an aircraft, or to the dropping of some heavy object by accident or design. The English Act provides that "where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in such aircraft, or by any article falling from such aircraft, to any person or property on land or water, damages may be recovered from the owner of the aircraft" (or in certain circumstances, from the lessee of the aircraft)—"without proof of negligence" unless there has been contributory

(1) Original Hartlepool Colliery Co. v. Gibb (1877), 5 Ch. D. 713.
(2) Dovaston v. Payne (1795), 2 H. Bl. 527.
(3) Harrison v. Duke of Rutland (1893), 1 Q.B. 142.
(4) Hickman v. Maisey (1900), 1 Q.B. 752.
(5) 10-11 Geo. 5 c. 80, s. 9.

negligence on the part of the person injured, and with, in the defendant, a right over against any other person who may have been solely responsible. The section is unsatisfactory in that part of it consists in an attempt to state compendiously, and therefore dangerously, some fundamental propositions of law of whose application, in the circumstances, there would be no doubt, by its apparent omission to cover cases of wreck, and by the imposition of liability independently of responsibility.

There is no lack of analogies by reference to which, if it is equitable to do so, the Courts may apply to cases which may come before them such presumptions and rules of law as the justice of the case requires, and if the Courts do not reach a conclusion that a liability to the surface owner arises from the fact of damage being caused by him from the air, or that this liability is to be imposed on the owner, whatever that may mean, of an aircraft even if it was at the time under the control of a thief, it will only be because it appears unreasonable and unjust to do so. There is authority, if circumstances require reliance upon it. The principle of Rylands v. Fletcher (1) might suffice, but as early as 1822 it was held in the United States that both the direct damage caused by the fall of a balloon and that resulting indirectly from the concurrence of the curious public could be recovered from the balloonist apart from negligence on his part (2). The longer final decision on the applicability of this rule is delayed, the less likely its adoption will become, and it seems, on the whole, much more satisfactory to leave the principles to be worked out on the facts of individual cases than to attempt to deal with the subject by statute. There is always danger, on subjects of this kind of falling into the error into which the British Parliament fell in 1865 when it directed that every vehicle propelled by steam or any other than animal power should be in charge of at least three men employed to drive and con-

(1) (1868) L.R. 3 H.L. 330.
(2) Guille v. Swan (1822), 19 Johns (N.Y.) 381. See also Canney v. Rochester (1911), 76 N.H. 60.
(3) 28-29 Victoria, c. 83, s. 3.

duct it, and should be preceded sixty yards in advance by a man bearing a red flag. (3). It was only in 1896 that an exception was made from these provisions in favour of motor cars—the exception in fact extending to all locomotive vehicles under three tons in weight. (1). We shall probably find that no legislation on the subject of liabilities arising from air navigation is immediately necessary; certainly any general legislation we could now pass would not only be incomplete, but would probably adversely affect the development of air navigation.

The Convention relating to International Air Navigation was drafted in Paris in 1919 during the peace negotiations by a Commission set up by the Conference. The problems involved were very thoroughly discussed at a series of meetings in some of which I had the honour of taking part as one of the British representatives. The Convention has been signed by twenty-six of the Allied and Associated Powers, and is about to be ratified by fourteen of these and two other States. After recognizing national sovereignty over the air spaces, the Convention provides that each state will accord freedom of innocent passage above its territory to the aircraft of other contracting states, except over specified prohibited areas, and even without landing, unless reasons of security or customs otherwise require. It forbids permission to pass being granted to aircraft not possessing the nationality of one of the contracting states, and further forbids any state to grant nationality to aircraft not belonging either to its nationals as individuals or to incorporated companies of which the president or chairman and at least two-thirds of the directors are its nationals. An Annex provides for the method in which registration is to be effected, and prescribes the registration marks to be adopted by each country. The Convention further requires that certificates of air worthiness shall be issued to any aircraft engaged in international navigation, and that certificates of competency shall likewise be issued to its officers. It and its Annexes also in-

(1) 59-60 Victoria, c. 36.

clude requirements as to the papers and logbooks to be carried; rules of the road, including signals; regulations as to the laying out of aerodromes, as to the minimum qualifications for certificates to pilots and others, as to weather reports and other like matters, and also a prohibition of the carriage in international traffic of explosives, or, except with special permission, of wireless apparatus. It follows that these subjects must be legislatively dealt with in each country, and that the legislation must apply not only to aircraft engaged in international air navigation but to all aircraft. The same rules of the road must apply to all. The same arrangement of aerodromes must be made for all, and indeed it would be impossible to comply with the provisions of the Convention without including domestic aircraft within the scope of the local regulations. The effect of the enforcement of the Convention will be that, so far as concerns the contracting states, the air will become almost as free as the sea.

Contemporaneously with the discussions in Paris the Canadian Parliament assumed jurisdiction. By the Air Board Act (1), assented to on the 6th of June, 1919, the Governor in Council was authorised to establish an Air Board of seven members, of whom the Chairman was required to be a Minister of the Crown, and two of the members were to be appointed as representatives of the Department of Militia and Defence and the Department of the Naval Service respectively, all of the members to hold office for a term of three years. The Board to be thus constituted was by the statute given administrative jurisdiction with respect to all matters, civil and military, relating to aircraft, and power was conferred upon it to make regulations relating to the licensing of personnel, aircraft and air-harbours, and to the navigation of the air generally, as well as to submit regulations for the governance of a military air force. The Board was constituted shortly after the passing of the Act, and the Air Regulations, 1920, regulating civil aviation, were approved by the Governor in Council on the last day of 1919.

(1) 9-10 Geo. V., c. 11.

These regulations, speaking generally, followed the provisions of the International Convention which had already been signed on behalf of Canada although not yet ratified. Under them no aircraft is allowed to fly in Canada unless it has been registered either here or in one of the other contracting states, and unless it bears the proper nationality and registration marks. The marks on Canadian aircraft consist of a group of five letters of which the first not only in Canada but throughout the British Empire is G. It is followed by a hyphen and four more letters of which, in the case of any Canadian aircraft, the first is C. The mark is so printed as to be legible from the ground, without a glass at low altitudes, or at high altitudes with one, and it also appears on the upper surface of the upper plane. The nationality marks also appear on both sides of the tail fin. Apart altogether therefore from any knowledge of the shapes of machines, any machine flying in Canada can be thus identified from the ground or from the air.

Equally, no pilot is allowed to fly, except for instruction, unless he has received a certificate to obtain which involves a medical examination, repeated every six or twelve months, and the successful passing of tests. Following the Convention, the regulations lay down detailed rules of the road and detailed instructions for the laying out and marking of aerodromes, the marks being such as to indicate from the air the size of the aerodrome, the direction of the wind, and, at night, any projections involving possible danger to navigation.

The United States, although it signed the Convention, has not ratified it, and has not passed any general legislation on the subject. Certain of the states have made regulatory provisions, but the general situation is still chaotic. In agreeing to the ratification of the Convention, power has been reserved to the ratifying states (with the consent of the International Commission for Air Navigation when this has been set up under the terms of the Convention) to make special arrangements with the signatory powers who have

not ratified and certain other countries, and, as regards the United States, Canada has, pending action by Congress, made a special exception in favour of American machines by virtue of which they are permitted to fly north of the Canadian boundary if an American nationality mark assigned by the Canadian Air Board is painted upon them and they are registered with the Board. The pilot in charge must be a qualified war pilot. This special exception has already been renewed twice, on each occasion for six months, but no application for a further renewal has been received since the last renewal period expired on November 1st.

It has not been expressly determined whether, in the event of a cause of action arising wholly in an aircraft having a nationality other than that of the state over which it at the time is, the laws of the country of its nationality apply either at all or to the exclusion of the laws of the country which whose air space the actionable conduct took place. So far as respects breaches of provisions of the Convention, it itself imposes upon the contracting states the duty of punishing infractions occurring as well on one side as the other of its boundary. It is suggested by a recent writer (1) that contraventions of local fiscal and like laws would be punishable only in the state enacting them, while crimes and torts might be cognisable by either of the states whose nationality the aircraft possesses or by that above which it was flying at the time. He moreover suggests that where difficulties arise in determining whether a given act has been done on the one or the other side of a frontier, both the adjacent states should be considered as exercising a condominium. Cases are bound to arise in which it is impossible to determine with accuracy on which side of a boundary line a given event occurred, but it is very difficult to see how the nationality of the craft can, in view of the Convention's declaration of national sovereignty over the air space over it, have any such legal effect as the nationality of a ship except when the aircraft is flying over the high seas. This, however, like many other

(1) J. M. Spaight: Aircraft in Peace and the Law, Macmillan, 1919.

difficult problems, remains to be worked out by judicial decision and if, as everyone familiar with the subject expects, the navigation of the air becomes a matter of every-day life, there will be many problems which will require consideration and decision by the Courts.

MIXED ARBITRAL TRIBUNAL.

The following announcement is made by the Custodian respecting the Anglo-German Mixed Arbitral Tribunal:—

The Mixed Arbitral Tribunal to be established between the United Kingdom, on the one hand, and Germany on the other hand, under article 304 of the Treaty of Versailles has been constituted and is about to begin work in London. The President of the Tribunal is Professor Eugene Borel, a Swiss jurist and Professor of Public and International Law in the University of Geneva. The British and German members are respectively Mr. R. E. L. Vaughan Williams, K.C., of Lincoln's Inn, and Dr. jur. Adolph Nicolaus Zacharias, Senatsprasident of the Hanseatic Oberlandesgericht.

A great part of the work of the Tribunal is to decide as to debts under article 296 of the treaty where a difference has arisen between an enemy debtor and an enemy creditor or between the British and German clearing offices. Under article 297 the Tribunal can determine compensation to be borne by Germany in respect of damage or injury inflicted on the property, rights or interests of British Nationals in German territory as they existed on August 1, 1914, by the exceptional war measures or measures of transfer mentioned in the annex to that article. The other matters within the jurisdiction of the Tribunal are set out in articles 299, 300, 302, 304, 305 and 310 of the treaty.

The procedure before the Tribunal is to some extent regulated by sections III to VII of Part X of the treaty, but the Tribunal has settled further and more detailed rules dealing with the manner in which claims must be submitted. Printed copies of these Rules of Procedure may be procured from the Government Printing and Stationery Office. They should be

read in conjunction with the provisions of the Treaty of Peace (German) Order, 1920.

The British Government has provided a court for the meetings of the Tribunal and an office for the Secretariat at 21, St. James's Square, London, S.W.1. Mr. Harold Russell, barrister-at-law, has been appointed by the Foreign Office to act as British Secretary, and the German Government is also appointing a Secretary, the two to act together as joint Secretaries of the Tribunal.

The High Contracting Parties under the Treaty have agreed that their courts and authorities shall render the Mixed Arbitral Tribunal, direct, and all the assistance in their power as regards transmitting notices and collecting evidence. The decisions of the Tribunal are final and conclusive. The place and time of sitting will be determined by the President of the Tribunal, and may be in London, Germany or elsewhere as the convenience of the parties or witnesses may require. The sittings will be public.

Time for Presentation of Claims.

1. The time within which claims are to be submitted to the Tribunal shall be as follows:—

(a) Appeals under Article 296, Annex, paragraph 20.

Within thirty days of the communication of the joint decision of the two clearing offices to the appellant.

(b) Claims under Article 297.

Within twelve months from the date of the publication of these rules in the place at which such claimant is residing, or within six months from the date on which the claimant learnt that damage or injury had been inflicted on his property, rights or interests, or within six months from the date on which the claimant learnt that restitution under section (f) of the said article had been made or refused, which ever period is the longer.

(c) Claims under Article 305.

Within twelve months of the publication of these rules in the place at which such claimant is residing, or within twelve months of the date on which the decision was given,

or within six months of the date on which such decision came to the knowledge of the claimant, whichever period is the longer.

(d) In all other cases.

Within twelve months from the date of the publication of these rules in the place at which such claimant is residing, with the exception of those cases provided for in rule 22, where the limitations of time imposed by these rules are stated not to apply.

After the expiration of the time prescribed by this rule, no claim will be accepted without the special leave of the Tribunal.

2. All claims, answers and other written proceedings must be delivered or sent to the Custodian Department of the Secretary of State.

REVIEW OF CURRENT ENGLISH CASES.

Motor Car—Driving "recklessly and at a speed dangerous to the public"—Conviction—Two offences—Duplicity—Motor Car Act 1903 (2 Edw. VII., c. 36), s. 1—(R.S.O., c. 207, s. 11 (2)).

The King v. Jones, 1921, 1 K.B. 632. The defendant was convicted of driving a motor car on a highway "recklessly and at a speed dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the said highway and to the amount of traffic which actually was at the time or might reasonably have been expected to be on the said highway." It was contended that the conviction was bad for duplicity on the ground that the statute created two distinct offences in driving recklessly—and at a speed dangerous to the public—but the Divisional Court (Lord Coleridge, Avery, and Salter, JJ.) held that the driving the car was an indivisible act which might constitute both offences charged and they dismissed the appeal.

Contract—Auction sale of government stores—Agreement by intending purchasers for a "knock-out"—Legality—Restraint of trade—Public policy.

Rawlings v. General Trading Co. (1921), 1 K.B. 635. This was an appeal from the judgment of Shearman, J. (1920), 3 K.B. 30, holding that it was illegal at an auction sale of government stores for persons to agree not to bid against each other, and that if the goods were purchased by one of them that they should be equally divided between them, the agreement being for what is in England called a "knock out." The majority of the Court of Appeal (Bankes and Atkin, L.JJ.) held that the agreement was not illegal and reversed the decision of Shearman, J., but Sutton, L.J., dissented.

Admiralty—Salvage—Misconduct of master and crew of salving vessel—Forfeiture of salvage—Owners of salving vessel.

The Kenora (1921), P. 90. This was a claim for salvage. The defence was that the master and crew of the salving vessel had been guilty of larceny of stores and effects of the vessel salved and that the right to salvage was thereby forfeited. Hill, J., however, held that the owners, who had in no way contributed, or been parties to the misconduct in question, were not thereby deprived of their right to salvage.

Admiralty—Salvage—Rescue of vessel from Bolsheviks—Status of Bolsheviks—Comity of Nations.

The Lomonosoff (1921), P. 97. This was an action for salvage of a vessel in the following circumstances. The plaintiffs, two British and two Belgian officers, were in Murmansk and in danger of being captured and shot by Bolsheviks,—whereupon they took possession of the vessel in question, and which was also in danger of being captured by the Bolsheviks, and by means of the vessel escaped to a Norwegian port where they delivered up the vessel to the owners' representative. Hill, J., held that notwithstanding the plaintiffs in saving the vessel they were also effecting their own escape did not disentitle them to salvage—that the Bolsheviks were not acting with

the authority of a politically organized and recognized society and that the danger of the vessel was not that of passing from one form of government to the control of another, but was analagous to a rescue from pirates or mutineers, and that there was nothing in the comity of nations which compelled the Court to treat the rescue as a rescue from lawful authority, and the claim for salvage was therefore allowed.

Practice—Parties to action—Joinder of defendants—Alternative relief against two defendants—Different causes of action—Common question of fact—Rule 126—(Ont. Rule 67).

Payne v. British Time Recorder Co. (1921), 2 K.B. 1. The plaintiff in this case sold to one of the defendants goods which the plaintiff had bought from the other defendant. The plaintiff vendee claimed that the goods supplied were not up to sample, and the plaintiff claimed that if they were not up to sample then their vendors had broken their contract with them and they claimed relief alternatively against one or the other of the defendants. Applications by the defendants to have their names struck out were refused by the Master and his decision was affirmed by Lawrence, J., and the Court of Appeal (Lord Sterndale, M.R., and Warrington and Scrutton, L.JJ.) held that the Court had a discretion to allow the joinder under Rule 126 (Ont. R. 67) to allow the joinder and that as there was common question of fact to be tried, namely, whether the cards were in accordance with the specimen supplied, that discretion had been rightly exercised.

Practice—Claim and counter claim successful—Costs—Taxation—Apportionment of costs.

Christie v. Platt (1921), 2 K.B. 17. In this case both claim and counter claim were allowed with costs and the question in dispute was as to how in such circumstances the costs should be taxed. In taxing the plaintiff's bill the Master allowed the costs of a brief at the trial, fees to counsel and costs and expenses of witnesses. In taxing the defendant's bill he allowed nothing in respect of these

items. Roche, J., held that he had proceeded on a wrong principle, and that costs incurred in supporting the claim and opposing the counter claim ought to be apportioned and the apportioned parts attributed to the claim and counter claim respectively, and similarly mutatis mutandis as to the defendant's costs, and the Court of Appeal (Atkin and Younger, L.JJ.) agreed that this was the proper method.

Money lender—Action against borrower—No defence of non-registration—Evidence of registration—Onus of proof—Money Lenders Act 1900 (63-64 Vict., c. 51), ss. 2, 3—(R.S.O., c. 175, ss. 11, 12).

Lipton v. Powell (1921), 2 K.B. 51. This was an action by a money lender to recover money lent. There was no defence of non registration and the question was raised whether the plaintiff could recover without proving registration as required by the Money Lenders Act 1900 (63-64 Vict. c. 51) (see R.S.O. c. 175, ss. 11, 12). The County Court Judge held that the plaintiff was bound to give strict proof of registration, but a Divisional Court (Lush and McCardie, JJ.) held that as there was nothing on the face of the transaction to suggest that the plaintiff was not registered and her agent at the trial had sworn she was registered, and the defendants did not attempt to shake his evidence by cross-examination or otherwise, and the defendant not having given notice of any such defence, they were precluded from setting it up, and that it was unnecessary for the plaintiff to give any formal proof of registration by an examined or certified copy thereof.

Charterparty—Construction—Provision for cesser of hire—Ejusdem generis rule.

S.S. Magnhild v. McIntyre (1921), 2 K.B. 97. This was an appeal from the decision of McCardie, J. (1920), 3 K.B. 321 (noted ante vol. 57, p. 41). The Court agreed with Roche, J., as regarded the non-applicability to the particular clause of the charter party to which he referred; but reversed his decision on the ground that by a subsequent clause in the charter party the particular cause of delay was thrown

upon the charterers. This clause stated—"but should the steamer be driven into port or to anchorage by stress of weather, or from any accident to the cargo or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing obstruction to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterer's account." The vessel while making its way to port up a river grounded on soft clay and was thereby delayed. This the Court of Appeal (Bankes, Warrington and Atkin, L.JJ.) held was within the clause above quoted and therefore occasioned no cesser of hire, and the judgment of McCardie, J., was therefore reversed.

Criminal law—Bigamy—Honest belief that former marriage dissolved—Offences against Person Act 1861—(24-25 Vict., c. 100, s. 57—(Crim. Code, s. 307).

The King v. Wheat (1921) 2 K.B. 119. This was a prosecution for bigamy and the question for the Court of Criminal Appeal (Bray, Avory, Shearmán, Salter and Greer, JJ.) was whether the accused's bona fide belief that he had been divorced from the bond of his first marriage was a sufficient defence in view of the fact that that belief was ill-founded. The Court held that it was not a defence and the conviction was affirmed. It may be observed that the jury found as a fact that the accused had the belief, but the Court of Appeal held that there was no evidence on which the jury could so find, but even if the finding were well founded it would be no defence. The Court in arriving at its conclusion discussed the case of Rex v. Tolson, 23 Q.B.D. 168, and disagreed with the general principle there laid down by Cave, J. In that case the second marriage had taken place in the bona fide belief that the husband of the first marriage was dead, and there was consequently no intention on the part of the accused to enter into a second marriage while her first husband was living, but in the present case there was that intention, based on the erroneous supposition of the first marriage having been legally dissolved. The case, in their Lordships' opinion, was governed by Rex v. Lolley, 2 Clk. & F. 567n, Earl Russell's Case (1901), A.C. 446.

Railway—Carriage of goods—Special contract—Owner's risk—Wilful misconduct—Loss of goods—Inference from conduct.

Smith v. Great Western Ry. (1921), 2 K.B. 237. The plaintiff in this action claimed to recover from the defendant company for damages for the loss of goods delivered to it for carriage. The terms of carriage were that the company should not be liable for loss, damage, misconveyance, delay or deterioration except upon proof that the loss, damage, etc., arose from the wilful misconduct of the company's servants. The parcel in question was never delivered to the consignee. After the lapse of 19 days the plaintiffs wrote to the company to complain, and were told the matter would have immediate attention. Having heard no more for three months, their solicitor wrote to the company, and they were again informed the matter should have immediate attention. A fortnight later the solicitor wrote threatening an action unless he received by return of post some account of what had become of the parcel, and were informed by the company that the reason of delay was because all the papers in reference to the matter had been lost and that as soon as possible a definite reply would be given. A week later an action was commenced in the County Court. In answer to interrogatories the defendant company stated that it had no knowledge whether the goods had been dispatched from the place where they were received or whether they had ever arrived at their destination, that there was no record of their having been so received, and that it was believed that the goods had been lost. At the trial the defendant company offered no evidence, and contended that it had no case to answer inasmuch as there was no evidence of any wilful misconduct on the part of the company's servants. The Judge of the County Court gave judgment for the plaintiff, which was reversed by a Divisional Court (Salter and Roche, JJ.) and this was an appeal from that decision, and the Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.) dismissed the appeal.

Company—Shares—Action for calls—Defence of misrepresentation in prospectus—Laches.

First National Reinsurance Co. v. Greenfield (1921), 2

K.B. 260. This was an action for call on shares of a limited company, and the defendant set up that he was induced to buy the shares by reason of misrepresentations contained in the company's prospectus. At the trial it was submitted on behalf of the company that even if there had been misrepresentations in the prospectus the defendant had allowed his name to remain on the register and had taken no steps to have it removed and was now by reason of his laches precluded from taking any such steps. The Judge who tried the case gave effect to this contention, and a Divisional Court (Lush and McCardie, JJ.) upheld his judgment.

Will—Real estate—Equitable limitations—First estate tail not in esse—Interim acceleration of life estate in remainder.

In re Conyngham, Conyngham v. Conyngham (1921), 1 Ch. 491. In this case the testator devised real estate in trust to pay his brother a certain annuity for his life with remainder to his issue in tail with remainder for life to the defendant, with remainders over. The brother was married but had no children. The Court of Appeal (Lord Sterndale, M.R., and Warrington and Scrutton, L.JJ.), affirming Astbury, J., held that until a child was born to the brother the remainder of the defendant was accelerated as to the surplus income of the estate.

Copyright—Infringement—Musical play authorship—Film production—Copyright Act 1911 (1-2 Geo. V., c. 46), ss. 1, 5, 8, 16 (8), 35.

Tate v. Thomas (1921), 1 Chy. 503. This was an action to restrain the infringement of copyright of a musical play by production of a film thereof. The plaintiffs were collaborators in the production of musical plays, and were applied to by one Peterman to compose the music and words of a play of which he supplied the name of the play, the leading characters, and the plot. On the completion of the work it was agreed that the plaintiffs were to be announced as the authors of it, but Peterman was to be at liberty to exhibit it on payment of certain royalties to the plaintiffs. On the completion of the work Peterman claimed to be the author, and gave a license to his co-defendent to produce a film of the play. Eve, J., who tried the action, held that

nothing which Peterman did in reference to the play was the subject of copyright, and that he was neither author, nor joint author of it with the plaintiffs; the learned Judge therefore granted the injunction.

Donatio mortis causa—Registered victory bonds—Incomplete gift—Executors—Registration of donee as owner.

In re Richards Jones v. Rebreck (1921), 1 Ch. 513. In this case the question was whether a gift of registered victory bonds made in the following circumstances was a valid donatio mortis causa. On Oct. 18, 1919, a testator suffering from various ailments and about to undergo a serious operation gave two registered victory bonds of £100 each to a lady who had been his close friend, saying to her, "Will you take them home and take charge of them until such time as I am able to go to London. But if anything happens to me you are to keep them for yourself." The testator was unable to undergo the operation and died on October 20, 1919. The victory bonds were registered in the name of the testator and each bond expressed all the terms on which the money was held and shewed the whole contract between the Government and the lender. Eve, J., who tried the action, held that there had been a good donatio mortis causa inasmuch as there was clear evidence that the testator intended that this lady should retain the bonds for herself in the event of his death and that the gift was not conditional on his death from any particular cause. Also that the bonds were a good subject for such a gift and that it was the duty of the executors of the testator to give effect thereto by executing such transfer as would enable the donee to be registered as the owner — the case being governed on this point by In re Dillon, 44 Ch. D. 76.

Foreign judgment—Enforcement of foreign judgment—Affiliation order against deceased putative father's estate.

In re Macartney; Macfarlane v. Macartney (1921), 1 Ch. 522. This was an action to enforce an affiliation order made in Malta against the estate of the putative father of an illegitimate child after his death. Astbury, J., who tried the action, held that the order was one that could not be

enforced in an English Court (1) as being contrary to public policy, inasmuch as the order recognised the right of an illegitimate child to perpetual maintenance out of the estate of the putative father; (2) because such a claim was a cause of action unknown to English law, (3) because the judgment was not final, but subject to be varied or terminated according to the child's circumstances. The action was therefore dismissed.

Company—Directors—Misfeasance—Transaction ultra vires the company—Honest error of judgment—Counsel opinion—Companies Act 1908 (8 Edw. VII., c. 69), s. 279.

In re Claridge's Patent Asphalte Co. (1921), 1 Ch. 543. This was a summary proceeding against a director of a limited company to recover damages for alleged misfeasance in office. By s. 279 of the Companies Act (8 Edw. VII., c. 69) a director may be relieved from liability for negligence or breach of trust "if he has acted honestly and reasonably and ought fairly to be excused." In this case the transaction impeached was wholly ultra vires the company but which the director acting on counsel's considered opinion honestly and reasonably thought to be intra vires, and Astbury, J., held that he was exonerated from liability.

Landlord and tenant—Sale of Reversion in two lots—Notice by purchasers to quit on several days.

In re Bebington; Bebington v. Wildman (1921), 1 Ch. 559. In this case a landlord sold part of his reversion to one person and part to another. Each purchaser gave the lessee notice to quit, one of them at one period and the other at another. The tenant had not attorned to either. This was a summary application to determine whether or not either notice was of any validity, and Peterson, J., who heard the application, decided that neither was valid.

Vendor and purchaser—Title—Devise to heir at law "absolutely"—Words of limitation or purchase—Rule in Shelley's case.

In re Hussey; Hussey v. Semper (1921), 2 Ch. 567. In this case the construction of the will of a testator was in question. By the will he devised real estate in trust to

William Hussey for his life and afterwards in trust "for his heir at law absolutely." The question was whether the rule in Shelley's case was applicable so as to give William Hussey the fee simple. Lawrence, J., was of the opinion that it did not apply, but that the case was within the exception established by Archer's case (1597), 1 Rep. 66b, and therefore that William took only an equitable estate for life and his heir at law took by purchase an equitable estate in fee simple.

Landlord and tenant—Covenant not to assign without consent—Covenant not to withhold consent unreasonably—Company—Voluntary liquidation reconstruction—Assignment to reconstituted company—Refusal of consent.

Ideal Film Renting Co. v. Nielsen (1921), 1 Ch. 575. This was an action for a declaration that the plaintiffs, who were under-lessees of the defendant, were entitled to assign the under leases under which they held without the consent of the defendant in the following circumstances. The under leases contained a covenant on the part of the plaintiffs not to assign without the consent of the defendant and also a covenant by the defendant that he would not withhold his consent unreasonably. The plaintiffs carried on a film producing business, but for want of the necessary capital with a view to a reorganization on a larger scale went into voluntary liquidation and a new company with a largely increased capital fully paid up was formed, to which the liquidator of the plaintiff company proposed to assign the under leases—to which the defendant refused to consent on the ground that it was a new company and had done no business. Eve, J., who tried the action, held this to be no reasonable ground for refusal, and the fact that the qualification of the lessees' covenant taking the shape of an express covenant by the lessor did not put the lessee in any worse position than if there had been an express qualification of his own covenant, but gave him further remedy against the lessor for breach of his covenant. The learned Judge therefore held that in the circumstances the plaintiff was entitled to make the proposed assignment of the leases without the consent of the lessor.

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THE PERMANENT COURT OF INTERNATIONAL JUSTICE.

One of the products of the upheaval caused by the Great War is the new tribunal known as the Permanent Court of International Justice.

What it will amount to remains to be seen. A Court for the trial of the disputes between citizens of a nation is one thing, and a Court to decide between different nations is another. The former is a recognised and obvious necessity and is therefor permanent, the latter is an experiment and a very doubtful one at that. The former has a police force at its back supported by the strength of the whole nation. The latter has not and never can have any police force and is supported only by the temporary sentiment of perhaps only some of the nations it purports to deal with. One of the litigants, one of the parties to a treaty, whilst the Court is adjusting its spectacles, may jump up and say this treaty is "only a scrap of paper" and promptly declares war against the other fellow. The Permanent Court thereupon also becomes scraps and passes into oblivion. We trust, however, that its permanence and usefulness may long outlive our expectations.

This Court was inaugurated at the Hague last month, and we are told that the President of the Court, Chief Justice Bernard Loder, of Holland, opened the preceedings, and the registrar read congratulations from many of the European Governments, after which all arose and took the oath successively, in the form of a "solemn declaration" in French or English, according to nationality.

Dr. Dacunha in his address, declared that February 15 was one of the great days in the annals of human justice.

"Among the peoples of the young American continent," he said, "the idea of international justice is perhaps stronger and

more alive than elsewhere. Their dearest ideal is accomplished here this day."

After a speech of welcome by the Burgomaster of the Hague, President Loder rose and, speaking in French, compared the Court to a tender plant for whose future the soil of Holland was peculiarly suitable.

"The opening of this Court," he declared, "is an event full of promise in the history of civilization: it marks the dawn of a new era through the collaboration of more than forty nations."

The members present were the President, or Chief Justice, Bernard Cornelius Johannes Loder, of Holland; Dr. Rafael Altamira Crevea, of Spain; Commendatore Dionisio Anzilotti, of Italy; Viscount Robert Finlay, of Great Britain; John Bassett Moore, United States; Dr. Max Huber, of Switzerland; Diderik Nyholm, of Denmark; Dr. Yorozu Oda, of Japan; and Dr. Andre Weiss, of France. The other two judges, Dr. Ruy Barbosa, of Brazil, and Dr. Antonio S. de Bustamento, of Cuba, were unable to come to the Hague.

APPEALS TO THE PRIVY COUNCIL.

We much regret that the Attorney-General of Ontario has again brought in a Bill to abolish appeals to the Judicial Committee of the Privy Council so far as that Province is concerned. The profession had supposed that the overwhelming voice of its members as evidenced in so many quarters during the past few years would have sufficed to have set the matter at rest at least for many years to come.

On the one side we have the strong opposition to any change expressed we believe unanimously by the representative bodies of the profession such as the Canadian Bar Association, the Law Society of Upper Canada and others in various parts of the Dominion. We have also the undivided opinion to the same effect of the Bar of Old French Canada, we have also on the same side the same voice that sent the best and bravest of our manhood to defend the solidarity of the Empire and an unbroken British connection and therein to strengthen the

ties which bind together all parts of the great world wide Dominion of which Canada forms a part. We have also those who, though recognising difficulties and inconveniences, have carefully studied the subject, and consider that these difficulties are outweighed by the great advantage of having British law made as uniform as possible for the whole Empire and settled by Judges of greater learning, more varied experience and larger vision than is possible under the conditions surrounding those who are called upon to administer justice in the outlying parts of the Empire.

On the other side we have a small minority who think differently, and there views are before the public and need not be repeated here. The question as to whether or not a Provincial legislature can deprive a citizen of his right to present his petition at the foot of the Throne is as yet undecided.

EFFECT OF THE EXPRESSION "IN TRUST" IN A CONVEYANCE.

In our last issue we published a very interesting article by Mr. F. P. Betts, K.C., on the above subject. Mr. John L. Whiting, K.C., of Kingston, calls our attention to the fact that neither the Court in the case of *Re McKinley and McCullough,* 51 D.L.R. 659, nor Mr. Betts refer to R.S.O. 1914, cap. 126, ss. 95, &c. We referred the matter to our contributor, the writer of the article, and having promptly heard from him we give his views in his own words as follows:—

"The sections of the Act spoken of enact:—

(1) There shall not be entered on the register or be receivable any notice of any trust, express, implied, or constructive.

(2) Describing the owner of any freehold or leasehold land, or any charge as a trustee, whether the beneficiary or object of the trust is or is not mentioned, shall not be deemed a notice of a trust within the meaning of this section, nor shall such description impose upon any person dealing with such owner the duty of making any enquiry as to the power of the owner in respect of the land or charge, or the money secured by the charge, or

otherwise: but, subject to the registration of any caution or inhibition, such owner may deal with the land or charge as if such description had not been inserted.

I take it that these provisions apply only to the Land Titles Act and are enacted in furtherance of the general policy of that act, namely:—that the transfer of land shall be rendered absolutely simple, and shall not be encumbered by anything that would have had the effect of encumbering it under the old system. I do not think the enactment in question can be urged as a sufficient reason for doing away with the obligation to make inquiry which was imposed by the words in question, under the old system.

No doubt on the one hand, it might be argued that by analogy, with the provision in the Land Titles Act, the Court would proceed on the same lines in the case of titles under the old system. On the other hand it might be argued with equal or perhaps greater force, that the Legislature enacted this provision in the case of the Land Titles Act exempting purchasers under that Act from making inquiry as to the trusts, knowing that if they did not do so, the obligation to make inquiry would rest upon the purchaser. In other words, it might, it seems to me, be very forcibly argued that the Legislature in passing the section to which you refer (95, 2) quite admitted that, except in the particular instance they were exempting, namely, a conveyance under The Land Titles Act, the description of the owner of the land under a conveyance as trustee, would undoubtedly impose upon any person dealing with such owner the duty of making inquiry as to the power of the owner in respect of the land, etc.

The point is undoubtedly one of great interest and also of very considerable importance both to the public and to the legal profession and I am much obliged to Mr. Whiting for drawing attention to this section."

*RIGHTS OF PASSENGER—EJECTMENT FROM CAR FOR NON-PAYMENT OF FARE.**

In some of the cases involving the question whether a passenger about to be wrongfully ejected because of his not having a ticket or because of his having a wrong ticket, where his failure to have a ticket or to have a proper ticket results from the negligent or wilful wrong of the carrier, it has sometimes been held that the passenger is under a duty to avoid the damage incident to ejection by paying the wrongfully required fare. The weight of authority is *contra,* but the number of decisions supporting the minority view is sufficient to justify an examination of the question with the purpose of determining the principles involved.

The courts that have decided that the passenger is under a duty to prevent the wrongful expulsion, are simply applying the rule of avoidable consequences to facts to which it can have no proper application, and forgetting to apply one of the most elementary rules of agency—the rule that a principal must answer for the acts of his agent within the scope of the business entrusted to the agent.

We shall first examine some of the cases holding that the passenger is under a duty to avoid wrongful expulsion by paying his fare a second time.

Van Dusen v. *Grand Trunk R. Co.* is a case in which it is held that the passenger was under a duty to pay his fare again in order to avoid his wrongful ejection from the train. The court said: "In the present case the failure of the former conductor to furnish plaintiff a check was evidently a mistake and the plaintiff, without discovering the mistake, had taken his seat in the train from Port Huron to Trenton, he at the time not possessing any evidence of his right to ride. Upon discovering this mistake his remedy was not by insisting upon a further breach of duty or of the rules of the conductor in charge of the Trenton train. On the contrary, it was his duty to leave the train peaceably, or pay his fare and seek his remedy for damages resulting from either necessity as the situation at the time required. But the evidence shows that he had the money with which to pay his fare, and he did so by a later train after

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being ejected. As he was not entitled to ride upon the train in question, it is apparent that the damages which he suffered by the fault of the first conductor are covered by a recovery of the amount of fare which he was compelled by his fault to pay." The court proceeds to distinguish this case from one in which the passenger presents a ticket, on its face, apparently good.

In the beginning of the above excerpt, the court speaks of the mistake of the former conductor just as a layman might speak of some error as being trifling and excusable. The court speaks as if it supposed that a wrong done by mistake is not a wrong at all.

Further, when the court says: "His remedy was not by insisting upon a further breach of duty," it seems to refer to the conductor's duty to the company employing him and completely to lose sight of the duty of the carrier to the passenger.

When the court speaks of the "duty" of the passenger to leave the train peaceably or pay his fare, it implies that the carrier, having threatened a wrong, has a right correlative with and commensurate to this duty. As affecting this supposed duty, it is said that the evidence showed that he had the money with which to pay his fare.

If it were an ordinary case in which A threatens B with a tort or with a breach of contract, unless B pays A one dollar, it would be said by any court that the fact that B had one dollar in his pocket was entirely immaterial. B's possession of one dollar would not be an operative fact producing, or contributing to the production of, a duty in B to pay A one dollar.

Another court, in such a case, has quoted the following without citing the source: "It is the duty of a party to protect himself form the injurious consequences of an unlawful act of another if he can do so by ordinary effort and care at a moderate and reasonable expense, and for such reasonable exertion and expense in that behalf expended he may charge the wrongdoer; and where by the use of such means he may limit and prevent further loss he can only recover such loss as could thus be prevented."

Even if this general rule as to avoidable consequences be applied to these cases, what would constitute "moderate and reasonable expenses?" It is clear that the difficulty of administering such a rule, in these cases, is very great. It might

seem easy to say that a ten-cent or a two-dollar fare would be only a "moderate and reasonable expense," and it might seem equally easy to say that, under most circumstances, a one-hundred-dollar fare would be larger than a "moderate and reasonable expense;" but where is the line to be drawn?

If such a "duty" exists, how is the situation affected by the fact that the passenger has or has not the amount of the required fare in his pocket. Some judicial opinions, like the one quoted above, affirming the "duty" of the passenger to pay the wrongfully required fare or to leave the train, lay stress upon the fact that the passenger had in his pocket sufficient money to pay such fare. This might be proper, if there were a real duty in the passenger to pay again; but there is no such duty.

The rule that a person who has sustained a wrong cannot stand by and permit the occurrence of injurious consequences that might be avoided by reasonable action on his part and then recover for such consequences, has no proper application here; for it governs only those cases wherein the wrong has already been committed. "It is a universal rule, both in tort and contract, that for such consequences of the wrong or injury as the plaintiff might, with ordinary prudence, have avoided, the defendant cannot be held responsible. The law assumes that a person injured will endeavour to reduce the amount of his loss within as narrow limits as possible, and if he does not do so, the consequences are not the proximate result of the defendant's act, but of his exercising, or neglecting to exercise, his own will."

Strictly, it cannot be said that, even where a wrong has already been committed, the person wronged is under any *duty* to avoid consequences. "It is sometimes said that a person who neglects to prevent the consequences of another's wrong fails in a duty; but since the result of neglecting it falls not on another, but on the person himself in fault, it seems to be one of those self-regarding duties which are outside the domain of the law.

Still less can it be said that a person threatened with a wrong is under any *duty* to the wrongdoer to prevent the doing of a wrongful act of the latter. To say that the person about to be wronged is under such a duty to the wrongdoer is to say that the wrongdoer has a *right* to require that the person about to

be wronged shall act to prevent the wrong; for *right* and *duty* are correlative terms, and, there can be no *duty* where there is no right commensurate therewith.

In a well known case, a street car line had a practice of giving transfer checks to passengers, who, having ridden on one of its lines, desired to ride on another line. The checks differed in language and color according to the line on which they were to be used, and were good only on the line indicated. The plaintiff, a passenger familiar with the practice, received a wrong transfer check, without reading it. The conductor on the second line refused to receive the transfer check. Plaintiff refusing to pay his fare again was ejected. Judgment for the defendant company was affirmed. The court said: "The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car; or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple and direct way. The checks used upon the defendant's road were transferable, and a proper check, when given, might be lost or stolen, or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, leave him to his remedy against the company for a breach of its contract. Otherwise, the conductor must investigate and determine the question, as best he can, while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the passenger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip; and, even if it should be ascertained by subsequent inquiry that he had obtained his passage fraudulently, the legal remedy against him would be futile. A railroad company is not expected to give credit for a single fare. A wrong decision against the passenger, on the other hand, would subject the company to liability in an action at law, and perhaps with substantial damages. The practical result would be, either that the railroad company would find itself obliged in

common prudence to carry every passenger who should claim a right to ride on its cars, and thus to submit to frequent frauds, or else, in order to avoid this wrong, to make such stringent rules as greatly to incommode the public, and deprive them of the facilities of transfer from one line to another, which they now enjoy. It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check, or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way."

This decision asserts the "duty" of the passenger to act to prevent the positive wrong of the carrier. Though this is a famous case it is a clear instance of a misapplication of the rule of avoidable consequences and a failure to apply the most elementary rules of agency.

This case very well expresses the minority view and assigns reasons which are probably the best so far stated for the minority rule. The real reason for the rule, as strongly indicated by the opinion, is the difficulty in which the carrier finds itself under the majority rule. But it is to be observed that that difficulty has not proven so great in states having the majority rule that legislative action repealing the rule has been deemed necessary. Speaking of difficulties, what about the difficulties under which the passenger finds himself under the minority rule?

Many of the cases often cited as holding that the passenger is under a duty to pay his fare a second time in order to prevent being wrongfully ejected, really hold nothing of the kind. For instance, the following cases, sometimes cited as so holding, do not support the minority rule: *Cincinnati, Hamilton & Dayton R. Co.* v. *Cole,* not squarely in point; *L.N. & G.S.R. Co.* v. *Guinan,* holding merely that exemplary damages cannot be assessed against the carrier, on the facts; *Lake Shore & M.S. Ry. Co.* v. *Pierce,* not strictly in point, because of the peculiar facts in the case.

Pullman etc. Co. v. *Reed,* sometimes cited in support of the minority rule, is not in point, as the decision rested upon another point; and the remarks of Mr. Justice Scholfield do not support the minority rule even as *obiter dicta.*

Sanford v. *Eighth Avenue R. Co.,* was a case in which the conductor, in expelling the passenger, used so much violence that the passenger was killed. The company was held liable for the wrong, and it is clear that remarks of the court on the "duty" of the passenger to pay his fare are very unimportant in determining the decision of the case.

Magee v. *O.R. & N. Co.,* also sometimes cited in support of the minority rule, is far from being in point; for no contract of carriage was proven.

We shall now examine some of the decisions to the effect that a passenger may recover for a wrongful rejection even though he might have prevented it by acceding to the unlawful demand of the carrier.

Plaintiff having a mileage book, but, through the fault of the defendant, not having procured a ticket in exchange for mileage coupons, was wrongfully ejected from defendant's train. The Supreme Court of North Carolina said: "It was further contended that there was error in allowing substantial damages for the wrong done defendant by reason that plaintiff might have prevented or avoided his chief grievance by paying the small amount of money demanded for his fare, but no such position can be allowed to prevail in this jurisdiction. The court has held, in several recent cases, that where one has been injured by the wrongful conduct of another he must do what can be reasonably done to avoid or lessen the effects of the wrong * * *. But the principle * * * does not arise or apply until after a tort has been committed or contract has been broken. A person is not required to anticipate that another will persist in misdoing until after a tort has been committed or contract has been broken. A person is not required to anticipate that another will persist in his course beforehand so as to avoid its result. On the contrary, he may assume to the last that the wrongdoer will turn from his way or in any even he may stand upon his legal rights and hold the other for the legal damages which may ensue.

In the latter case cited below, speaking to this question, the court said: 'Lenhart paid for and presented a legal ticket. To

the proposition that he could not stand upon his consequences of its threatened breach of contract, to pay his fare again in cash, if he had it, and then sue for its recovery, we do not yield our assent. After a breach of contract has been committed, the injured party is not allowed to aggravate his damages, and is required to use reasonable diligence to minimize them. But, beforehand, one is not forced to abandon his legal right under a contract, and waive the damages that may arise from its breach, in order to induce his adversary not to proceed as he wrongfully claims is his right'."

Plaintiff, a passenger on a stret car of defendant company, having paid his fare and received a transfer check entitling him to continue his trip by the next connecting car on another of the company's lines, took the next car. The conductor collected the transfer check. Without any previous notice to plaintiff, the car, after going only a short distance, was taken from the line, at the power house. Plaintiff, seeing that the car was being taken off and that the conductor had gone, asked the driver of the car what to do. The latter told him to take the next car, then approaching. Plaintiff did so. The conductor demanded fare, which plaintiff refused, stating the facts. Plaintiff was forcibly put off the car. Defendant had judgment by direction. Plaintiff appealed. The Supreme Court of Minnesota said: "The facts thus stated presented a case which would have justified a verdict for the plaintiff. He had paid the proper fare, and was entitled to ride on the cable line, to its end. It is to be kept in mind that the action is not against the conductor for the expulsion. The cause of action set forth in the complaint covers the whole transaction above stated; and the inquiry is whether, upon the whole case, the defendant appears to have neglected or violated its duty towards the plaintiff, to his injury. If it be said that, since the plaintiff could present no proper evidence of his right to ride, it was the duty of the conductor to put him off, it may be answered that the defendant, and not the plaintiff, may well be deemed at fault for that condition of things. That is one of the grounds upon which, in part, the defendant may be held responsible. Even though the conductor, in ejecting the plaintiff, may have done only what was apparently (to him) his duty, it does not follow that the defendant is not responsible therefor. It would be responsible if, by its previous neglect of duty towards the

passenger, it had justified him in assuming to continue his journey on a car from which the conductor, in accordance with the regulations of the defendant, should expel him for non-payment of fare * * *. The case is distinguishable from those where one enters a carriage, knowing that he is without such evidence of the right of passage as the reasonable regulations of the carrier require."

Following the same general line of reasoning is the following: "No man is bound to submit to even a trifling extortion. If he had a right to be carried for the sum tendered to the conductor, then the expulsion was purely wrongful, and for the consequences thereof the defendant was liable. The plaintiff was under no obligation to purchase even for a trifle the right which was already in his own. The principle is elementary."

Plaintiff bought a ticket from Kokomo to Indianapolis. The conductor took the ticket, but later ordered plaintiff to pay from Noblesville to Indianapolis, saying that the ticket collected had entitled plaintiff to ride only to Noblesville. Plaintiff, refusing to pay the fare as requested, was ejected at a small town. The court said: "It is true that the appellee was offered an opportunity to pay his fare, and continue his journey unmolested, and that he had the money with which to pay, and was advised to settle the matter with the agent at Kokomo, and that he refuesd to do so, and that he refuesd to leave the car until the conductor took hold of him, and that no great violence or injury was done to his person * * *. We do not concur in the doctrine that it was the duty of the appellee to pay the extra fare demanded of him, and afterwards settle the question in dispute with the company or its agents; nor do we think his failure so to do can be considered in mitigation of damages. It is true that the amount demanded was trifling, but the principle involved is the same as if the sum had been a large one. However much we may commend the conduct of that person who yields his rights to avoid a difficulty, it is nevertheless the privilege of every person to stand upon his strict legal rights, and the law does not require him to yield them, or make concessions to avoid trouble * * *. It comes with an ill grace for the appellant, after it had pushed what it believed to be its rights to the last extremity, to say that, because it offered to carry appellee if he would pay his fare, the damages ought to be mitigated."

An Indiana court, in laying down, in another kind of case, the general principle governing these cases, said: "He [the the wrong will be committed, even though it has been threatened person about to be wronged] is not required to anticipate that by the wrongdoer, or to forego the lawful use of his property."

Where an agent of a railroad company, negligently supplies a passenger with a wrong ticket or with no ticket, the neglect of duty is, according to the most elementary principles of the law of principal and agent, an act or an omission committed by the company itself. Such an act or omission is a violation of the carrier's duty to the passenger. Later, when the passenger, as a result of this violation of duty, is facing the conductor with a wrong ticket or with no ticket, he is merely facing a second agent of the company,—another agent whose acts are those of the carrier. If the carrier, through its conductor, wrongfully insists upon payment of fare, whether the conductor be acting in good faith or not, the carrier is insisting upon a thing which it has no right to require, and the carrier's subsequent ejection of the passenger on the ground of non-compliance with the carrier's wrongful request for fare is a positive wrong. The passenger is under no greater legal duty to pay his fare to prevent this wrong than the duty under which he would be to pay a highwayman the contents of his purse in order to prevent his being shot.

LAW OF DIVORCE IN CANADA.

By C. S. McKee, of the Toronto Bar.

1. Early History of Divorce and the Development of English Divorce Law.
2. Jurisdiction. Provinces with Divorce Courts.
3. Jurisdiction. Parliamentary Divorce.
4. Declarations of Nullity.
5. Grounds for Divorce.
6. Defences in Divorce Cases.
7. Procedure.
8. Parliamentary or Judicial Divorce?
9. The Decree.

1. Early History of Divorce and the Development of English Divorce Law.

An examination of the records of early Babylonia, Egypt, Phoenicia, and Assyria would no doubt reveal the existence of divorce in some form even at such remote a period as 3000 or 4000 B.C. But, since in the writings of the Greeks and Romans and in the Bible, there are not only traces of the most remote antiquity, but also the ideas on which are founded the laws, both moral and legal, by which modern society is controlled, these may be taken as a starting point.

At the time of Plato (430-347 B.C.), the Greeks had given apparently a definitely recognized place in their civilization to the principle of divorce. In his treastise on the laws, Plato states that he would take away from parties interested the license of separation which had theretofore existed, and would place divorce under the control of State authorities. If, he says, through infelicity of character, a man and his wife cannot agree, let the case be put into the hands of 10 impartial guardians of the law, and of 10 of those women to whom the matter of marriage is committed; let them reconcile the parties if they can; if this cannot be done, let them act according to their best ability in providing them with new spouses.

The Romans in even their very earliest days recognized divorce. Plutarch in his Life of Romulus (735 B.C.) narrates: "Romulus also enacted some laws; amongst the rest, that severe one which forbids the wife in any case to leave her husband, but gives the husband power to divorce his wife in case of her poisoning his children, counterfeiting his keys, or being guilty of adultery. But if on any other occasion he put her away, she was to have one moiety of his goods, and the other was to be consecrated to Ceres; and whoever put away his wife was to make an atonement to the gods of the earth." Later in Roman history, it is found that "divortium" ("dis"-apart, and "vertere"-to turn) was closely connected with the idea of "pater familias." The daughter passed to the son-in-law "in manus;" but, at one time, could be taken back even against the wishes of both. The even limited restrictions placed by Romulus on divorce was abolished, and complete freedom restored by the Twelve Tables (450 B.C.). However, public opinion is reported to have restrained the practice—even to the extent that for 500 years, there were no divorces. Divorce must have returned —with both its advantages and its disadvantages—for the "Lex

Julia de adulteriis" (A.D. 193) recognised divorce both by the husband and the wife; the requirements were a bill ("libellus repudii") and public registration thereof; the Act was still purely one of the party performing it, no judicial decision being necessary; a pecuniary readjustment was a consequence, whether or not as a restriction on divorce is not clear. Later, the "Lex Julia" was extended, limiting the reasons for which divorce could be made without pecuniary forfeiture as well as the right to re-marry. Still later, both these matters were altered again, this time so as to allow greater freedom. It should be borne in mind that all through this period of Roman history marriage was regarded as a mere contract, and hence divorce was possible by mere consent.

During the age referred to in the last paragraph, the Hebrews were developing their theories of divorce. In the twenty-fourth chapter of Deuteronomy (1451 B.C.) it is written:

"1. When a man hath taken a wife, and married her, and it come to pass that she find no favour in his eyes, because he hath found some uncleanness in her, then let him write her a bill of divorcement, and give it in her hand, and send her out of his house.

2. And when she is departed out of his house, she may go and be another man's wife.

3. And if the latter husband hate her, and write her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house, or if the latter husband die, which took her to be his wife;

4. Her former husband, which sent her away, may not take her again to be his wife."

A new view point is introduced by Christ in his sermon on the Mount, when he said: (5 Matthew—A.D. 31).

"31. It hath been said, whosoever shall put away his wife, let him give her a bill of divorcement:

32. But I say unto you, that whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery: and whosoever shall marry her that is divorced committeth adultery."

In 19 Matthew, 3-9, He again expressed the same views, adding that Moses had suffered the people to put away their wives only because of the low moral character of the period. But Christ went even farther than this, for in 10 Mark (A.D.

32) He said:—"12. And if a woman shall put away her husband, and be married to another, she committeth adultery."

After Christianity had exerted its influence over Rome, divorce by consent was forbidden except the husband was impotent, either party desired to enter a monastery, or either was in captivity for a long time. "Let at first by justifiable disrelish for the loose practices of the decaying heathen world, but afterwards hurried on by a passion of asceticism, the professors of the new faith looked with disfavour on a marital tie which was in fact the laxest the western world has seen." (Maine).

By the time the two powers of Roman Law and Christianity had definitely joined forces, and, in the form of the Roman Catholic Church, had started on their conquest of Western Europe, two forms of divorce were quite clearly established—both under the control, not of the State, but of the Church. One was known as divorce "a mensa et thoro," and amounted to what would be known to-day as merely a separation—e.g., there was no bar of dower nor any right to re-marry. The other was called divorce "a vinculo," and either annulled the marriage for causes occurring before the sacrament or dissolved it for causes occurring later. The Church in practice recognized only divorce "a mensa et thoro" and annulment of marriage for causes occurring before or at the time of the ceremony—this latter being not strictly divorce in its modern sense. The causes for annulment were more numerous before than after the Reformation (1500); after this time they were limited to relationship within forbidden degrees, previous marriage, corporeal imbecility, and mental incapacity; and as in these cases it was held that there was in fact no "vinculum," the Church of Rome was able to maintain its stand that marriage was a sacrament and indissoluble. The reformed church, however, refused to regard marriage as purely a sacrament, and in fact recognised it as a civil contract, requiring (in England at least) some religious solemnity. Once the aspect of a civil contract had appeared, the struggle between Church and State over the question of divorce had commenced—the struggle which colors all the later history of British divorce, and which has had much to do with the development of the present status of the question in Canada.

This limitation of the cases to which annulment could apply and the recognition of marriage as a contract were the causes of Parliamentary Divorce. It would appear that Parlia-

ment first made itself active in the matter of divorce in the middle of the sixteenth century. Several divorce bills were passed in favour of Henry VIII, but were really declarations of nullity. About the year 1549 the Marquis of Northampton divorced "a mensa et thoro" his wife for adultery, re-married, and had this second marriage confirmed by Parliament—only to have the statute repealed in the next reign on the accession of Mary, a Roman Catholic. However, during the next 50 years, marriage was not as a fact held by the Church—and therefore not by the courts—to be indissoluble; but the first half of the seventeenth century saw the pendulum swing the other way again, saw the old theories of the Church in supremacy, debarring absolute divorce and re-marriage. Lord Roos having obtained a divorce "a mensa et thoro" (1666), an Act was passed permitting him to re-marry, the theory of the indissolubility of marriage being thereby distinctly negatived. The first example of an actual dissolution by Parliament was the *Macclesfield* case (about 1700) where the wife frustrated all attempts to obtain a divorce from the ecclesiastical courts, with the result that a special Act was passed. Up to this time, the few who had applied to Parliament had supported their claim by special reasons—such as the desirability of avoiding bastard children or of continuing the name. The first case in which Parliament was applied to as a matter of course and of right was in 1701, when there was passed "An Act to dissolve the marriage of Ralph Box with Elizabeth Eyre and to enable him to re-marry again," a wording which was followed down to 1858. In 1798 standing orders were framed for the House of Lords—there had first to be a divorce "a mensa et thoro" before the Ecclesiastical Courts, and an action against the adulterer for damages in a Civil Court. The cost of a non-contested application was from £700 to £800.

In 1853 a commission was appointed to examine into the question of divorce, and its report recommended: 1. The transfer of jurisdiction from Parliament to a Court. 2. That the Court should consist of three judges. 3. That the husband should be able to get a divorce merely on the grounds of his wife's adultery, but that this should not be a sufficient ground for the wife to obtain a divorce. 4. That the causes for which a divorce should be allowed to a husband should be adultery, cruelty, or desertion. After several attempts, an Act embodying these recommendations was passed in 1857 (Imp.)

ch. 85. The Court was established as the Court of Divorce and Matrimonial Causes, and by the Judicature Act (1873) the jurisdiction of both this Court and the Ecclesiastical Courts was transferred to the Probate and Divorce Division of the High Court of Justice. The jurisdiction is as follows:

1. Dissolution of marriage. 2. Nullity of marriage. 3. Judicial separation, prior to 1857, in the hands of the Ecclesiastical Courts. 4. Restitution of conjugal rights. 5. Jactitation of marriage. 6. Alimony in certain cases. 7. Custody of children. 8. Application of damages recovered from an adulterer. 9. Settlement of the property of the parties. 10. Protection of the wife's property. 11. Reversal of decree of judicial separation and decree "nisi" for divorce.

Since 1858, cases from Ireland and from colonies not having jurisdiction within Courts of their own have continued to be heard by Parliament—in theory by the whole House of Lords, but in practice by only the law lords. Although the right still exists for people domiciled in England to apply to Parliament for a divorce on grounds not covered by the Act, e.g., insanity —none have done so; and in the case of such an event happening, the attitude of Parliament would in all probability be not to grant the divorce; but, if convinced of the desirability of such an innovation, to amend the existing legislation so as to give the Probate and Divorce Division jurisdiction.

2. Jurisdiction. Provinces With Divorce Courts.

At the commencement of the study of divorce jurisdiction in Canada, it must be borne in mind that prior to Confederation, Canada, as it now is known, did not exist; in its place were several separate colonies. Of these colonies, Prince Edward Island Nova Scotia, New Brunswick, and British Columbia had, and still have, Courts with jurisdiction in divorce cases. In view of recent decisions of the Privy Council, the position of the three Western Provinces is unique and will be dealt with separately.

Until 1857, applications in England for divorce were made to Parliament; it is, therefore, not surprising that a similar situation existed in the colonies named above. An Act passed in 1833 and amended by 5 Wm. IV. ch. 10 P.E.I., (1835—assented to 1836) enacted that in the colony of Prince Edward Island all questions of marriage and divorce should be heard by the Lieutenant-Governor and his Council. Then the Act went further; and, probably in an effort to retain the analogy to the procedure

in the House of Lords where divorces were usually disposed of by only the law lords, provided that the Lieutenant-Governor and five of his Council should constitute a Court for the disposal of divorce applications, and provided that the Governor would depute the Chief Justice of the Supreme Court to act in his place. No provision was made for appeal. Only one divorce has been granted—in 1913. The law of the Province remains as it was in 1836.

The Revised Statutes of Nova Scotia 3rd. Series (1864), ch. 126, established a Court of Marriage and Divorce consisting of the President, Vice President, and members of the Executive Council of the colony, and provided that the Vice-President and any two Councillors were sufficient to constitute the Court. By 1866, (N.S.), ch. 13 the style was changed to the Court for Divorce and Matrimonial Causes, the then Vice President to compose the Court and be called Judge in Ordinary. Any party dissatisfied as to findings of law or fact can within 14 days appeal to the Supreme Court of Nova Scotia, the appeal to be heard by three Judges of that Court and the Judge in Ordinary. This jurisdiction is now contained in R.S.N.S., (1900), vol. 2, p. 862.

1791, (N.B.,) ch. 5, established a similar Court in New Brunswick: all controversies in regard to marriage and divorce were to be determined by the Governor and Council, and the Governor and any 5 or more of the Council were constituted a Court. In 1834, ch. 30 the Council was divided into legislative and executive sections, and the Court made to consist of the Governor, Executive Council, and any Justices of the Supreme Court or Master of the Rolls. In 1860, (N.B.), ch. 37 enacted that all divorce jurisdiction was vested in the Court of Divorce and Matrimonial Causes, one Justice of the Supreme Court being commissioned the Justice of the Court. This jurisdiction is now contained in C.S.N.B. (1903), ch. 115 and 1917, (N.B.), ch. 45.

The establishment in British Columbia of a Divorce Court came about in a different manner. An ordinance passed March 6, 1867, by the Legislature of B.C. enacted that the laws of England as they existed on November 19, 1858, and so far as circumstances permitted should be in force save so far as they had been modified by legislation between 1853-67. Under this, jurisdiction to exercise the relief and powers given under the English Divorce Act (1857 (Imp.), ch. 85) has been assumed by

the Supreme Court of British Columbia and is contained in R.S. B.C. 1911, ch. 67. The jurisdiction of the Supreme Court of B.C. to grant divorce was questioned but upheld in *S.* v *S.* (1887), 1 B.C.R. 25. It was also upheld by the Privy Council in *Watts* v. *Watts*, [1908] A.C. 573, 77 L.J. (P.C.) 121. The cases are tried by one Judge.

Such then was the situation in these 4 colonies when the B.N.A. Act was passed in 1867 (Imp.), ch. 3. The distribution of powers as between Dominion and the Provinces was provided for by secs. 91 and 92. Section 91 reads: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and the House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

26. Marriage and divorce.

27. The criminal law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the classes of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Section 92 reads: "In each Province the Legislature may exclusively make laws in relation to the matters coming within the classes of subjects next hereinafter enumerated, that is to say,

12. The solemnization of marriage in the Province.

14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts.

16. Generally all matters of a merely local or private nature in the Province. . ."

Considerable discussion has taken place as to the distinction intended between 91-26 and 92-12. Clement, in The Canadian Constitution, points out that 91-26 refers to the question of

status of husband, wife, and issue; and this interpretation would appear to be correct, for Solicitor General Langerrin in his speech during the debates on confederation at the Quebec Conference said: "The word 'marriage' has been placed in the draft of the proposed constitution to invest the Federal Parliament with the right of declaring what marriages shall be held and deemed to be valid, throughout the whole extent of the Confederacy. . . ." The law officers of the Crown in England in 1870 also pointed out that the Provincial Legislatures had power to legislate upon such subjects as the issue of marriage licenses, while the Dominion had power to legislate on all matters relating to the status of marriage—e.g., between what persons and under what circumstances it could be created. The same interpretation is supported by Lefroy in The Canadian Federal System when he points out that the Privy Council have held in *Re Marriage Law of Canada,* 7 D.L.R. 629, [1912] A.C. 880, that 92-12 is by way of exception to 91-26. The jurisdiction of the Dominion Parliament is well illustrated by R.S.C., c. 105, which enacts that a marriage shall not be invalid merely because the woman is the sister of a deceased wife, and by the Criminal Code which defines bigamy and polygamy and constitutes it a crime to solemnise marriage contrary to the provincial law. The question of provincial powers in regard to legislating on marriage will be returned to in the chapter on annulment of marriages.

Another section of the B.N.A. Act indirectly concerned with the subject of divorce is 129: "Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union and all Courts. . . existing therein at the Union, shall continue as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain . . .) to be repealed, abolished or altered by the Parliament of Canada, or by the Legislatures of the respective Provinces, according to the authority of the Parliament or of that Legislature under this Act." It is under this section that the Courts of Nova Scotia and New Brunswick get their authority to continue to deal with cases of divorce, no repeal of their prior authority having been made by the Dominion Parliament, which is clearly (91-26) the body having authority to alter or repeal jurisdiction in regard to divorce.

The last section of the B.N.A. Act which concerns divorce

is section 146, which enacts that Prince Edward Island, British Columbia, Rupert's Land, and the North West Territories may be admitted into the Union upon terms and subject to the provisions of 1867 (Can.) ch. 3 and that the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of Great Britain. Under this section, B.C. was admitted in 1871, and P.E.I. in 1873, the Orders in Council in each case providing for the continuance of the existing Courts with their then jurisdiction which in both cases as has been seen, included divorce.

At this point the question naturally arises of where the power lies to amend the B.N.A. Act. There can be no doubt that the powers of the Canadian Parliament within the Act are plenary—i.e., complete and full—and as long as it keeps within the Act, Parliament can legislate as it sees fit. For example, it can say on what grounds if at all divorce shall be granted. But it could not deprive itself of all legislative jurisdiction over divorce and hand it over to the Provincial Legislatures; such action would amount to an amendment of the Act, and this can be done only by the Imperial Parliament. (*Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96.) It is obvious that for Parliament to give to a Court—Provincial or Dominion—jurisdiction to try divorce cases amounts to no such amendment, the legislative control would remain in the proper place.

The Maritime Provinces and British Columbia have had Courts exercising jurisdiction over divorce for many years; the three prairie Provinces have discovered only very recently that they too have this jurisdiction. Until 1917, the practice in these Provinces was to apply for divorce to the Senate. *Walker* v. *Walker* was an application brought in the Court of King's Bench of Manitoba (See (1918), 28 Man. L.R. 495 at p. 496) for a divorce on the grounds of impotency. The case came up for trial before Galt J., who found that the grounds on which the application was founded were sufficient, if the Court had jurisdiction. As the case was the first of its kind to come before a Court of the Province, it was dismissed — so that it might be more fully argued by a higher Court. An appeal was made to the Court of Appeal for Manitoba (1918, 39 D.L.R. 731, 28 Man. L.R. 495); the Attorney General of the Province was represented, and a leading King's Counsel was asked to appear as though for the defendant, who up to this stage had not appeared. The appeal was heard in 1918, and allowed, the opin-

ion of the Court being summed up in a very long and exhaustive judgment by Perdue, J.A. From this decision an appeal was made to the Privy Council, where the appeal was dismissed in July, 1919, 48 D.L.R. 1 (annotated), [1919], A.C. 947, it being held that the Provincial Court had jurisdiction. Section 146 of the B.N.A. Act had provided that Rupert's Land and the North West Territories could be admitted to Confederation, and in 1870 an Order in Council admitting them had been passed. Part of the former District of Assiniboia had become the Province of Manitoba. When the Hudson Bay Co. came into existence it had taken over land, and with this had gone the laws as they existed in 1670 and the power to make new laws. The Council of Assiniboia by an ordinance passed in 1851 had provided that for the laws of England as existing in 1670 should be substituted the laws existing at the accession of Queen Victoria, and in 1864 there were substituted for the latter, all such laws of England of a subsequent date as should be applicable. 1869 (Can.), ch. 3, provided that on the admission (then contemplated) of Rupert's Land and the North West Territories, all laws then in force there and not inconsistent with the B.N.A. Act should remain in force until altered. By 1870 (Can.), ch. 3, Manitoba was formed out of part of Rupert's Land and the North West Territories, and to get over doubts which had arisen as to the power of the Dominion to make new Provinces, this was confirmed by 1871 (Imp.), ch. 28. In order to remove doubts which had arisen as the result of the decision in *Sinclair* v. *Mulligan* (1888), 5 Man. L.R. 17, the Dominion Parliament passed, 1888, (Can.), ch. 33. It provided that, with exceptions which do not concern divorce, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, so far as the same existed in 1870, had been and from that date were in force in Manitoba, in so far as applicable to the Province and unrepealed by Imperial or Dominion legislation. On these grounds, especially the Act of 1888, the Judicial Committee of the Privy Council decided that the Court of King's Bench had jurisdiction to hear applications for divorce. The matter seems so very plain that it is surprising that it had not been settled in this way many, many years ago.

The next Province to venture into the new field was Alberta. *Board* v. *Board* (1918) 41 D.L.R. 286, 13 Alta. L.R. 362, affirmed 48 D.L.R. 13, [1919] A.C. 956, was a reference to the Appellate Division by Walsh J. of a motion to quash a petition for

divorce on the ground of lack of jurisdiction. The motion was dismissed, Harvey C. J. dissenting. The opinion of the Court was exhaustively set out by Stuart J. It was pointed out that it was the first case of its kind, and that the mere fact that Parliament had entertained divorce applications from Alberta could not be treated as a legislative interpretation of the meaning of the Act of 1886. The Dominion Parliament by 1886 (Can.), ch. 25, sec. 3 (now sec. 11) had enacted: "Subject to the provisions of the next preceding section, the laws of England relating to civil and criminal matters as the same existed on the fifteenth day of July in the year of our Lord one thousand eight hundred and seventy shall be in force in the Territories . . . and in so far as the same have not been or may not hereafter be repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories or of the Parliament of Canada or by any ordinance of the Lieutenant Governor in Council." The preceding sub-section contains nothing affecting the question involved. At the date mentioned, the Divorce Act was in force in England. Reference was made to *S.* v. *S.*, 1 B.C.R. 25 and to *Walker* v. *Walker*, 39 D.L.R. 731, 28 Man. L.R. 495. It was argued that the sections of the Act dealing with the establishment of the Supreme Court impliedly limit the meaning of sec. 3 because there is an omission of reference to the British Divorce Court in detailing the jurisdiction to be exercised by the Provincial Supreme Court. But, it was held that sec. 3 is perfectly clear, and should be taken to mean exactly what it says; and it was further held that it is a well established British principle that the law can come before the establishment of the Court which is to enforce it. The Alberta Act, 1905 (Can.), ch. 3 had continued the law of the Territories until it should be altered. Lastly, it was pointed out by Stuart J., that all jurisdiction—all law—must come before one or other of His Majesty's Courts; there can be no such thing as a law and no Court to enforce it; and the Supreme Court is the Court with jurisdiction in this case. When the case came before the Judicial Committee of the Privy Council, it was pointed out that an amendment in 1858, (Imp.) ch. 108 to the British Divorce Act provided that all Judges of the three Common Law Courts were to be Judges of the new Divorce Court. The committee also pointed out that the Act of 1907, ch. 3 had set up a Supreme Court, and that it is a rule as regards presumption of jurisdiction in such a Court that as stated by Willis J. in *Mayor, etc., of London* v.

Cox (1867), L.R. 2 H. of L. 239, at p. 259, nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so. As the history of legislation for Saskatchewan runs parallel to that for Alberta, the decision of *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956, is being followed in the former province.

Up to this point, the purpose of this chapter has been to trade the establishment of divorce jurisdiction in the Courts of 7 of the 9 Provinces. A later chapter will deal with procedure. Here, the law for these 7 Provinces in regard to the name of the Court, the number of Judges, trial by jury, and appeals might be summarized. In P.E.I., the Divorce Court is known as the Court of Divorce; in N. S. and N. B., it is the Court of Divorce and Matrimonial Causes; in the 4 Western Provinces, divorce jurisdiction is exercised by the Supreme Court of the Province. The number of Judges required to hear the applications in P. E.I. is 6—not really Judges but members of Council; in the other Provinces applications are heard by one Judge.

In P.E.I., there is no provision for trial by jury. In N.S., questions of fact, except adultery, may be determined by a jury. In N.B., questions of fact, if the Judge deems it proper, may be determined by the verdict of a jury of 7, and either party may apply for a special jury, which consists of 14 chosen by a prescribed process of elimination from an original panel of 28. In the other 4 Provinces, either party may insist on having the contested matters of fact tried by a jury; and if the husband claims damages from the adulterer, these in all cases are to be assessed by a jury. From the Court of the Lt. Governor in Council in P.E.I., there is no appeal. In N.S., any party dissatisfied as to the findings of law or fact may appeal within 14 days to the Supreme Court of the Province, the appeal to be heard by 3 Judges of that Court and the Judge of the Divorce Court. In N.B., the Judge has the usual powers to set aside a verdict and order a new trial, and an appeal lies to the Supreme Court against any judgment allowing or refusing a new trial provided notice of such appeal is given within 20 days after judgment is pronounced. Further, any party dissatisfied with any decision of the Divorce Court may appeal to the Supreme Court of N.B., from whose decision a further appeal may be made direct to the Privy Council. In the other 4 Provinces where divorces are tried by the Supreme Courts of the Provinces, the rules as to appeals are as in other cases.

So far, jurisdiction has been considered only from the standpoint of the body which exercises it. Over whom is this jurisdiction exercised? In the first place, it should be noticed in passing that although the Roman Catholic Church recognises annulment of marriage—on the theory that no real marriage has ever existed—it persistently refuses to recognise divorce of two legally married people; it still clings to the old belief that marriage is a sacrament and indissoluble. So, although the Courts may grant divorces to Roman Catholics, their new legal status will not be recognised by the Church.

The second point to note is that the place of the marriage does not make any difference; the status need not have been created within nor according to the law of the jurisdiction. Of course to be a divorce, there must be a legal marriage; and the Court will enquire to see that the parties have complied with the proper law, a question concerned rather with the validity of marriage than with divorce, which starts from the basis of a proper legal marriage. The validity of the marriage will depend on two facts: capacity of the contracting parties, and observance of the necessary formalities. Capacity is the legal power of doing an act which can legally be done by a person. The only logical grounds for incapacity are insanity and infancy, but several others in regard to religion and consanguinity have been added in many countries. By a number of leading cases, it has now been decided that the question of capacity is one to be determined by the *lex actus* together with the *lex domicilii* (as regards essentials as distinct from mere ceremonies in connection with the celebration) of both parties, except where the domicil of one party is British and the incapacity of the other party is not recognised by English Law: *Brook* v. *Brook*, (1861), 9 H. of L. Cas. 193, 11 E. R. 703, 7 Jur. (N.S.) 422, 9 W.R. 461, (prior to Deceased Wife's Sister Act 1907, (Imp.) ch. 47. This was marriage to deceased wife's sister; both parties were domiciled in England; ceremony was performed in Denmark where such a marriage would be valid. Held invalid in England. *Sottomayor* v. *De Barros* (1879), 5 P. & D. 94. Marriage in England of two Portuguese subjects, but domiciled in England. They were first cousins, and therefore incapable of contracting a valid marriage with each other in Portugal. Marriage held valid. *De Wilton* v. *Montefiore*, [1900] 2 Ch. 481, 69 L.J. (Ch.) 717, 48 W. R. 645. Similar to *Brook* v. *Brook*, except that in this case it was a marriage to a niece. *In*

re Bozelli, [1902] 1 Ch. 751, 71 L.J. (Ch.) 505, 50 W. R. 447. In 1871, an Englishwoman domiciled in England married an Italian domiciled in Italy. After the death of her first husband being still domiciled in Italy, she married in 1880 the brother of her deceased husband, also an Italian domiciled in Italy. The required dispensation was obtained from the civil and ecclesiastical authorities, and the ceremony properly celebrated. The marriage was held to be valid in England.

Simonin v. *Mallac* (1860), 29 L.J. (Mat.) 97, 2 Sw. & Ir. 67, 164 E.R. 917, 6 Jur. (N.S.) 561. It was here held that the consents of and notices to parents or others held necessary by many laws to the validity of a marriage are considered merely as part of the form or ceremony of the marriage, and not a question of capacity. Here two French subjects were domiciled in France. The proposed husband could not get the necessary consent of his father to the marriage. The two went to England and were there married. The marriage was held valid by English Courts. *Ogden* v. *Ogden*, [1908] P. 46, 7 L.J. (P.) 34. Consent of father held to be question of form and not of capacity. The observance of the necessary formalities is of course governed by the *lex actus*, with certain exceptions in regard to embassies, uncivilised countries, and as provided for by the British Foreign Marriage Act, 1892, (Imp.) ch. 23. Even though the *lex actus* and *lex dimicilii* have been complied with in all particulars, English law will not recognise, no matter where celebrated, marriages which are criminal or which are essentially of a type not recognised in general by Christendom —e.g., even the first of a series of polygamous marriages will not be recognised, because it is not "the voluntary union for life of one man and one woman to the exclusion of all others." *Hyde* v. *Hyde*, (1866), L.R. 1 P. & D. 130. Here the marriage had been made in Utah, according to Morman rites, but with the intention to contract a Mormon marriage, and the English Divorce Court refused to dissolve it, on the ground that no marriage had ever taken place.

Thirdly, the place of committment of the adultery or other offence is not a determining factor in establishing jurisdiction: *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435. Two people were domiciled and married in Scotland. The wife during the continuance of the Scottish domicile committed adultery in Scotland. The husband later acquired an English domicile, and

sued for a divorce in England on the grounds of the adultery committed in Scotland. A decree was granted.

Lastly, the Courts of the various Provinces have jurisdiction to try only divorces of people domiciled at the commencement of the action in the Province concerned: *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, 64 L.J. (P.C.) 97. Parties had been married in England, and England was still their domicile, although they were resident in Ceylon. Application for a divorce made by husband to a Court in Ceylon. Held on appeal that as the husband's domicile was not Ceylon, the Court there had no jurisdiction. Domicile is not to be confused here with residence. *Goulder* v. *Goulder*, [1892] P. 240. A husband and wife were domiciled in England, but were residing in France; the wife committed adultery in Paris. It was held that the English Court had jurisdiction to entertain the husband's application for a divorce. Furthermore, jurisdiction is not determined by a person's allegiance—by what is popularly known as his nationality: *Niboyet* v. *Niboyet* (1878), 4 P. D. 1, 48 L.J. (P.) 1, 27 W.R. 203. Two French subjects domiciled in Manchester; held that the Court had jurisdiction. With an exception to be discussed presently, a married woman cannot acquire a domicile separate from her husband; she must therefore bring her application for a divorce in the Province wherein her husband is domiciled. Suppose, however, she brings it in another Province, and the husband consents to the jurisdiction; does this give the Court jurisdiction? Ordinarily such a consent would give jurisdiction, but it has been held that it will not give jurisdiction in cases of divorce: *Armitage* v. *Atty-Gen'l*, [1906] P. 135, 75 L.J. (P.) 42). The husband was domiciled in New York State and the action was brought in South Dakota: the husband entered an appearance and thereby consented to the jurisdiction. It was held by an English Court that this had not given the Dakota Court jurisdiction. Sir Gorell Barnes, Pres. Probate Division at p. 140: "There is a passage in Mr. Dicey's book on domicile . . . where he appears to think that a party by appearing . . . may give the Court jurisdiction. . . That, I think, is not in accordance with the law of this country." The exception to this general rule is given by Dicey on Conflict of Laws at p. 363 as follows: "In the following circumstances, that is to say:—

(1) Where a husband has (a) deserted his wife; or (b) so conducted himself towards her that she is justified in living

apart from him; and (2) That parties have up to the time of such desertion or justification been domiciled in England [the Province]; and (3) The husband has after such time acquired a domicile in a foreign country, but the wife has continued resident in England [the Province]; the Court (*semble*) has on the petition of the wife jurisdiction to grant a divorce." The exception was recognised in *Stathatos* v. *Stathatos*, [1913] P. 46, 82 L.J. (P.) 34. An undefended petition by a wife for divorce on the grounds of adultery and desertion. The petitioner had been married to a Greek in London. She had been deserted, the husband later getting a decree of nullity in Greece, and remarrying there. The grounds for the declaration of nullity were the absence from the marriage of a Greek priest, grounds recognised in Greece, but not in England. It was held that the Court had jurisdiction, it being pointed out that it would be absurd to hold that a deserted wife should be obliged to follow her husband around the world in an endeavor to catch up to him for the purpose of bringing an action for divorce in the jurisdiction of his domicile. Lastly, it should be noted that for a declaration of nullity of marriage, residence less than domicile is sufficient, in fact, jurisdiction then depends on where the marriage has been celebrated or where the respondent is more or less permanently resident. This is only reasonable, for the domicile of the woman may depend on the very point under consideration—the validity of the marriage. *Linke* v. *Van Aerde* (1894), 10 Times L.R. 426. A Dutch couple were married in England. It turned out that the husband had been previously married to another woman still living. After both had ceased to be domiciled in England, the wife sued for a declaration of nullity. Held that the Court had jurisdiction.

3. JURISDICTION. PARLIAMENTARY DIVORCE.

From a study of the previous chapter, it will be apparent that to-day the only parts of Canada where Parliamentary divorce is still a necessity are Ontario and Quebec. Of course, the jurisdiction of Parliament over divorce in general, and it is open to persons domiciled in any Province to apply to Parliament for a divorce; but, in practice, applications have in the past been confined to persons domiciled in Quebec, Ontario, the three prairie provinces, and the Yukon. In the future, such applications will in all probability be confined to Ontario and Quebec.

In the early days, Prince Edward Island had adopted a com-

promise between Parliamentary divorce and a Divorce Court; the reference was to a Court, but one composed not of Judges but of the chief parliamentary dignitaries of the Province; as divorce never became an acute problem, there the matter rested until caught by Confederation. New Brunswick and Nova Scotia adopted similar arrangements; but, with the example of England before them, altered to real Divorce Courts before 1867; the situation has of course remained unaltered since the B.N.A. Act. The western Provinces, at a time after 1857, had adopted for them by the Dominion Parliament (except British Columbia, which did the legislating itself), British legislation; their population prior to Confederation was almost non-existent; and where such a situation exists, it is obvious that divorce is never a pressing problem. The absence of a Divorce Court in Quebec is hardly to be wondered at, when it is remembered that the Province is inhabitated largely by adherents of the Roman Catholic Church, which has always been firm in its stand against divorce under any circumstances—Italy, Spain, and Ireland have no divorce courts. "In Quebec, by virtue of the Quebec Act of 1774, the laws of Canada were made the laws of the Province as to all matters of controversy respecting property and civil rights. The laws of Canada had their basis in the old French law which prevailed in Canada during the French regime; but with the grant of the rights of self government, the former Province of Canada acquired the right to make laws for itself, among other things, within certain limitations, on the subject of marriage; and the Provincial Law of Quebec on the subject of marriage is now to be found in the Code Civil and Provincial Statutes passed since 1774 up to 1867." (Holmested). The laws of England in regard to property and civil rights as existing in 1792 were adopted in Upper Canada, and on the subsequent institution of the Courts of Common Law and Chancery their jurisdiction was limited to that possessed by the corresponding Courts in England, which at that time did not include divorces. Prior to the Act of Union in 1840, there was apparently very little need for the consideration in Upper Canada of the question of divorce, owing to the small population. This idea is supported by the fact that until 1837 there was no equity jurisdiction—e.g., in regard to trusts, specific performance, and foreclosure—that it took 10 years to get this equity jurisdiction established, a dispatch from the Secretary of State for the colonies drawing attention to the increase in the population and

the necessity for greater jurisdiction having been sent to the Lieutenant-Governor of Upper Canada in 1827. The first record of divorce in the annals of the Province was in 1833, when a bill was introduced to provide for the establishment of a divorce court, but was later dropped. Two petitions for bills of divorce were presented in 1836, but no action appears to have been taken on them. The first divorce recorded is that of John Stuart which was passed by the Legislative Assembly of U. C. in 1839, a judgment having first been obtained against the adulterer for £671-14-3. Two more applications made in 1840 to the Legislature of the new United Canada were abandoned. From 1840 to Confederation, Ontario was joined to Quebec; and, as their object was to live and develop peaceably together rather than to quarrel over a semi-religious question, it is little wonder that a divorce court was not established. In 1845 the *Harris* case was heard; by the time the bill had passed, both parties had left the country, so the bill was disallowed by Her Majesty. Between 1845 and 1867, only three divorce bills were passed. In 1845 a motion to appoint a committee to draft a bill providing for a Divorce Court was defeated, as was a similar motion the next year. In 1859 a communication wes received from the Imperial Parliament recommending the establishment of a Divorce Court, but no action was taken on it. The result of a petition from the City of Quebec in 1860 was the same. Numerous times—1870, 1875, 1888, and 1919, at least—the question of establishing a Divorce Court has come up in Parliament, but never with the result of having a bill passed.

(To be continued in April issue.)

HOME RULE FOR IRELAND.

We are apparently after all to have a Dominion Sister in South Ireland but she prefers to be called after the South African fashion the Free State of South Ireland. We and others of the Dominion Class may feel complimented by a former partner of the Royal firm of Great Britain and Ireland descending from his high estate and becoming like ourselves, one of the Branch Houses of that regal firm.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

MATRIMONIAL HOME—RIGHT OF WIFE TO RESIDE IN MATRIMONIAL HOME PENDING SUIT.

Wilmott v. Wilmott (1921), P. 143. This was an action for restitution of conjugal rights. The husband had left his wife alone in the matrimonial home and had refused to live with her on account of her persistent drunken habits. He offered her a weekly allowance and to find her accommodation elsewhere which she refused. The house was the husband's, and the wife moved for an injunction to restrain her husband from preventing her living in the matrimonial home pending the suit. Hill, J., held that she had no such right and refused the motion.

NEGLIGENCE—DANGEROUS WORK—DUTY TO EXERCISE CARE——BENZOL—MOTOR GARAGE—MASTER AND SERVANT—SMOKING—SCOPE OF EMPLOYMENT.

Jefferson v. Derbyshire Farmers (1921), 2 K.B. 281. The plaintiffs were the lessors and lessees of a motor garage of which the lessees had agreed with the defendants to give them the use, as a garage for motor lorries. A youth employed by the defendant in the garage, while drawing benzol from a drum into a tin struck a match and lit a cigarette, and then after the manner of smokers, threw the match on the floor. This set light to some oil and petrol lying on the floor, the fire spread to the benzol flowing from the drum, and the garage and its contents were destroyed. Horridge, J., who tried the action held that the youth in lighting a cigarette and throwing the match on the floor was not acting within the scope of his employment and therefore the defendants were not liable on that ground; but he held they were liable on the ground that the bringing of benzol into the garage and filling tins there, was a breach of the defendants' agreement not to store spirit in the garage, and on that ground he held the defendants were

liable for the loss. The defendants appealed on the ground that the lessor was not a party to the agreement as to storage and could get no benefit from a contract to which he was not a party; and also that the lessor could not recover because the bringing of a drum of spirit on the premises was not a storing of it on the premises within the contract. The Court of Appeal (Bankes, Warrington and Atkin, L.JJ.) agreed with the defendants' contention, but, nevertheless, without calling on the plaintiffs affirmed the judgment on the ground that the defendants' servant in filling the tin was acting within the scope of his employment and was bound to exercise reasonable care, and that the lighting of a match and throwing it on the floor while engaged in the work was a neglect to exercise reasonable care for which the defendants were liable.

GAMING—PARTNERSHIP FOR CARRYING ON BETTING BUSINESS—LEGALITY OF BUSINESS.

Jeffrey v. *Bamford* (1921), 2 K.B. 351. This was an action by a firm of bookmakers to recover certain moneys paid by them to the indorsees of cheques given her in respect of bets won by her on horse races. The defendant set up that bookmaking was an illegal business and the plaintiffs had no right of action. In other transactions the defendant had lost but had not paid certain bets. The action was brought under the Gaming Act 1835 s. 2 (see R.S.O. C. 217, s. 3). Notwithstanding the dictum of Moulton, L.J., in *Hyams* v. *King* (1908), 2 K.R. 696, 718, and the opinion of Darling, J., in *O'Connor* v. *Ralston* (1920), 3 K.B. 451, McCardie, J., held that the carrying on of a betting business is not *per se* illegal and that the defendants were entitled to recover.

CRIMINAL LAW—INDICTMENT—UNCERTAINTY.

Rex v. *Molloy* (1921), 2 K.B. 364. The Court of Criminal Appeal (Darling, Avory and Sankey, JJ.) held that an indictment charging two separate felonies in the alternative is bad for uncertainty, *e.g.*, in this case the indictment charged that the prisoner "stole, or with intent to steal, ripped and severed or broke" certain fixtures. The form in Archbold's Criminal Law (25th ed.) was held to be incorrect.

SALE OF GOODS—CONTRACT FOR DELIVERY AT FIXED TIME—DELIVERY WITHIN REASONABLE TIME—MEASURE OF DAMAGES—SALE OF GOODS ACT 1893 (56-57 VICT. C. 71), S. 51 (3)—(10-11 GEO. V. C. 40, S. 49 (3) ONT.)

Millett v. *Van Heek & Co.* (1921) 2 K.B. 369. In 1916 the plaintiffs entered into a contract for the sale and delivery to the defendants of cotton waste. The contracts provided that shipment of the cotton was to be subject to the permission of the Government. When the contracts were entered into cotton waste could only be exported by permission of the Government, but in 1917 its export was absolutely prohibited. A correspondence then took place between the parties, as a result of which as Greer, J., who tried the action, found the parties entered into a new and binding agreement whereby the deliveries were suspended until the removal of the embargo the defendants being willing to accept the balance of the goods after the removal of the embargo, but in August, 1918, the plaintiffs repudiated the contract. In January, 1919, the embargo was removed. The plaintiffs claimed a declaration that the contracts had been put an end to; but this relief was refused and the only question was as to damages to which the defendants were entitled by reason of the plaintiffs' repudiation of the contract in 1918, and the main point was whether the latter part of sec. 51 (3) of the Sale of Goods Act (see 10-11 Geo. V. c. 40, sec. 49 (3) Ont.) applied to an anticipatory breach of contract arising from repudiation. On the reference to assess the damages the Master assumed that it did apply and the damages were assessed with reference to the market price of the goods at the date of the repudiation of the contract by the plaintiff. The Divisional Court (Bray and Sankey, JJ.) held that this was erroneous and that *prima facie* the damages should be the difference in price between the contract price and the market price at the time at which the goods should have been delivered according to the terms of the new contract, and as the deliveries were to be made at different times, the rule must apply to each delivery, but if it could be shown that a reasonable course for minimising the damages could have been taken then that would have to be taken into account in estimating the damages. With this conclusion the Court of Appeal (Bankes, Warrington and Atkins, L.JJ.) agreed.

RAILWAY—CLOAK ROOM—DEPOSIT OF ARTICLE—DEPOSIT TICKET—CONDITION ON TICKET—NON COMPLIANCE BY BAILOR WITH CONDITIONS—NEGLIGENCE IN CUSTODY OF BAILMENT.

Gibaud v. *Great Eastern Ry. Co.* (1921), 2 K. B. 426. This was an appeal from the judgment of a Divisional Court (1920) 3 K.B. 680 (noted ante vol. 57, p. 180), and the Court of Appeal (Lord Sterndale, M.R., and Scrutton and Younger, L.JJ.) have affirmed the decision, that Court holding that the omission by the defendants' servant to put the bicycle in the cloak room did not entitle the plaintiff to recover having regard to the condition on the deposit ticket.

NEGLIGENCE—DEATH OF CHILD FOUR YEARS OLD—DAMAGES—FATAL ACCIDENTS ACT, 1846 (9-10 VICT. C. 93), SS. 1, 2—(R.S.O. 151, SS. 2, 3)—EVIDENCE.

Barnett v. *Cohen* (1921), 2 K.B. 461. This was an action under the Fatal Accidents Act to recover damages for the death of a child four years old in which two points are discussed. First whether depositions taken at a coroner's inquest together with the verdict and rider of the jury can be used in an action subsequently brought in respect of the death of the deceased which was the subject of the inquest as proof of the negligence of the defendant, and McCardie, J., held they could not. Second the question of damages and on this point the learned Judge held that a mere speculative possibility of pecuniary benefit did not constitute any ground of damages, and in order to recover the plaintiff must establish that he lost a reasonable probability of pecuniary advantage. The action for want of this evidence therefore failed.

WILL—SOLDIER—REVOCATION—WILL EXECUTED IN ACCORDANCE WITH WILLS ACT—LETTER BY TESTATOR REQUESTING WILL TO BE BURNT—WILL BURNT NOT IN PRESENCE OF TESTATOR—WILLS ACT 1837 (1 VICT. C. 20) SECS. 9, 10, 11—(R.S.O. 120, S. 14, 23).

In Re Gossage, Wood v. *Gossage,* 1921, P. 194. This was a probate action and the question at issue was whether a will duly executed by the testator in accordance with the Wills Act, could be subsequently revoked on the testator going on active

military service by a letter requesting its destruction, and its destruction as requested though not in the presence of the testator. Bailache, J., held that it could, and the Court of Appeal (Lord Sterndale, M.R., and Warrington and Younger, L.JJ.) affirmed his decision.

DIVORCE—DOMICIL—MATRIMONIAL JURISDICTION OF INDIAN COURTS—BRITISH SUBJECTS RESIDENT, BUT NOT DOMICILED IN INDIA.

Keyes v. Keyes, 1921, P. 204. In this case the validity of a divorce granted by an Indian Court in a case in which the parties were British subjects who were resident but not domiciled in India, was in question. The marriage was solemnized in India and the acts of adultery in respect of which the divorce proceedings were instituted were also committed there, but Duke, P.P.D., held that the Indian Courts had no jurisdiction over British subjects not domiciled there. The same rule would be applicable we presume to divorces granted by Canadian Courts to persons not domiciled within the territorial limits of such Courts, but with regard to Canadian Parliamentary divorces it is possible the case might be otherwise.

ADMIRALTY—NECESSARIES—ACTION IN REM.

The Mogileff (1921), P. 236. This was an action *in rem* for necessaries supplied to a foreign ship. The claim was not disputed, but it was contended on behalf of the owners that an action *in rem* would not lie, and that the plaintiffs' only remedy was by an ordinary action *in personam*, but Hill, J., after an elaborate review of the cases, came to the conclusion that the action was well brought, and though it might be inferred from the course of business that the plaintiffs had agreed to look to the personal liability of the owners, and that the advances made by the plaintiffs must be treated as items of a mercantile account to be adjusted in accordance with the terms of the agency agreement existing between them; yet the mere fact that the plaintiffs were the shipowners' regular agents did not deprive them of their rights *in rem* under the Admiralty Courts Acts, 1840 and 1861.

COPYRIGHT—AGREEMENT BY AUTHOR TO GIVE PUBLISHERS OFFER OF NEXT THREE BOOKS—OPTION TO ACQUIRE INTEREST IN COPYRIGHT—NOTICE—INJUNCTION TO RESTRAIN BREACH OF AGREEMENT.

Macdonald v. *Eyles* (1921), 1 Ch. 631. The plaintiffs who were publishers entered into an agrement with the defendant Eyles whereby she agreed to give the plaintiffs an option to publish "her next three books" on royalty terms. In violation of the agreement, without giving the plaintiffs an option to publish one of her "next books," she made arrangements with her co-defendants to publish, they having notice of the agreement with the plaintiff. This action was brought to restrain both defendants from publishing the book in question, and Peterson, J., granted the injunction, he holding that the contract was not a contract of personal service but a contract by the defendant Eyles to sell the product of her labour which could be specifically enforced by injunction.

RESTRAINT OF TRADE — AUCTIONEERS AND ESTATE AGENTS—CLERK—CONTRACT OF SERVICE—RESTRICTIVE COVENANT.

Bowler v. *Lovegrove* (1921), 1 Ch. 642. This was an action to enforce a restrictive covenant, whereby the defendant, who had been a clerk in the plaintiff's employ, bound himself that after he had ceased to be in their employment he would not for the term of one year carry on or be interested in carrying on the business of an estate agent and auctioneer within the borough of Portsmouth or in the town of Gosport, the places where the plaintiffs carried on their business. The plaintiffs' business was that of auctioneers and estate agents and the defendant's duty, while in the plaintiff's employ, was to interview people and to obtain for the plaintiffs buyers or sellers, or intending lessors or lessees of house property. The plaintiffs duly terminated the defendant's employment in September, 1920, and on leaving their service the defendant at once set up business as an estate agent within the prohibited area, but he did not take out an auctioneer's licence or do business as an auctioneer—although he used the initials A.A.I., meaning Associate of the Auctioneers' Institute. Lawrence, J., who tried the action, held that the covenant in question was not void for uncertainty, but that the defendant in carrying on the

business of an estate agent only had not violated it, nor had he by using the initials A.A.I. held himself out to be an auctioneer. He was also of the opinion that the clause being intended *per se* to prevent competition was wider than was reasonably necessary for the protection of the plaintiff's business.

CHARITY—HOSPITAL FOR SICK AND WOUNDED SOLDIERS—HOSPITAL CLOSED — SURPLUS ASSETS — RESULTING TRUST—GENERAL CHARITABLE INTENTION—CY-PRES.

Re Welsh Hospital, Thomas v. *Attorney-General* (1921), 1 Ch. 655. This was a summary application to determine what should be done with certain funds which had been subscribed for the establishment of a hospital for soldiers, and which had been closed leaving a surplus of £9000. Lawrence, J., who tried the motion, held on the evidence that there was no resulting trust in favour of the subscribers, but a general charitable intention for sick and wounded Welshmen which enabled the Court to apply the surplus cy-pres.

Book Reviews

Handbook of the Law of the Sale of Goods. By JOHN DELATRE FALCONBRIDGE, M.A., LL.B., of Osgoode Hall, Barrister-at-Law, Lecturer to the Law Society of Upper Canada. Toronto: Canada Law Book Company, Limited. 1921.

It is pleasant to notice that good legal literature produced in Canada is appreciated in other parts of this wonderful Empire that we are proud to belong to. It is, moreover, a further proof of the solidarity of that Empire and the spirit of comradeship which prevails among its members.

This is drawn to our attention by reading in the South African Law Journal a review of Mr. Falconbridge's book on the law of the sale of goods. We presume most of our readers are familiar with this volume, if not they ought to be.

It is interesting in this connection to remember that the law of South Africa is based on the old Roman Dutch law. And our readers are perhaps aware that this branch of the Civil law

is particularly rich in the legal lore appertaining to the sale of goods.

In view of what we have said, we are glad to give in our columns the criticism of Mr. Falconbridge's work as it appears in our South African contemporary.

It reads as follows:—

The learned author of this work is doing yeoman service in providing text-books on Canadian Law. He has already published books on "Banking and Bills of Exchange" and "The Law of Mortgages of Real Estates."

In Canada, except for the Province of Quebec, the English Sale of Goods Act, 1893, is now in universal application, and in this book the arrangement of that Act is fairly closely followed.

The difference between the Sale of Goods Act and the Uniform Sales Act now in force in many parts of the United States are carefully indicated. There is an excellent index and a lengthy table of cases. The Roman-Dutch Law of Sale of Goods, of course, differs in some respects from that laid down by the Sale of Goods Act, but there are many points of resemblance, and these English cases are frequently quoted in our Courts. In addition, as commerce increases it is necessary to have some acquaintance with the laws of those with whom the majority of our commercial transactions take place. As a clear statement of the subject this book reaches a very high level, and it can be heartily recommended as a concise exposition of the law of Canada and the majority of the British Dominions, Colonies, and Possessions on the subject. The law in force in the United States is also clearly stated. The book contains less than two hundred pages, but room has been found for a large number of references to English authorities. When reviewing the author's work on Mortgages we are able to congratulate ourselves on the equity and simplicity of the Roman-Dutch system. Modern development in commercial matters have made it necessary to supplement much of the Roman-Dutch Law on the subject of the Sale of Goods, and though the underlying principles are as sound as ever, this process of supplementation has not always proceeded on sound lines, and as a result difficulties have arisen and occasionally principles appear to be brought into conflict. It becomes necessary, therefore, to see what is done under foreign systems of laws and look to these for guidance in cases of difficulty.

Bench and Bar

Viscount Bryce.

Rt. Hon. Viscount Bryce, P.C., O.M., G.C.V.O., F.R.S., D.C.L., died at Sidmouth, February 22nd, in his 84th year. He was the son of James Bryce, LL.D., of Blantyre, Glasgow.

This is a great loss to the legal profession and to the public. Our limited space would fail to tell adequately of his brilliant career. He was known the world over as one of the greatest authorities on constitutional law and general jurisprudence. One of the most illuminating works ever written is his "American Commonwealth," and by which he will be best remembered.

Appointments to Office.

Robert Grant Fisher, of the City of London, Ontario, K.C., to be a Judge of the Supreme Court of Ontario and a member of the High Court and Appellate Division. (February 15.)

James Arthur Mulligan, of the town of Sudbury, Ontario, K.C., to be Judge of the County Court of the County of Carleton. (February 15.)

Peter Charles Larkin, of the City of Toronto, Esquire, to be High Commissioner for Canada in Canada, and to be a member of the King's Privy Council for Canada. (March 1.)

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BLUE SKY LEGISLATION.

The meaning and intent of Blue Sky legislation has, until recently, been unfamiliar to the general public, and even the legal profession has been somewhat hazy respecting its nature and extent. Those who have financial dealings with the United States are somewhat better informed. The subject has been prominently brought before the public recently through the introduction by the Attorney-General in the Legislature of Ontario of a Bill intituled "An Act respecting the Sale of Securities."

Briefly speaking, the term Blue Sky legislation has been applied to any species of law which attempts to regulate or deal with the sale of fraudulent or worthless securities. The imposition on the public of these so-called "securities" has been a growing evil in every community since the time when corporate entities became recognized by law. The expression "Blue Sky legislation," which is not in any way indicatory of the subject, seems to have arisen from an expression used in a report made by the United States Post Office Department that some promoters would even sell lots in the blue sky. To give entry and seizin in such a case would not, however, be much more difficult than it would be in the case of the celebrated company "North Pole, Ltd.," where the promoter undertook to deliver ice-covered land to farmers in the Northern States.

As early as the year 1884 Germany had limited the sale of fraudulent securities, and in 1893 France followed suit. Great Britain has now a very strict Companies Act, which answers many of the purposes intended to be covered by Blue Sky legislation. In 1911 the State of Kansas enacted the first law on this continent, since when some 43 of the States have enacted laws which, in some form or other, regulate and control the issue and sale of stocks, bonds, debentures and other securities.

With the exception of three Provinces, Canada has been slow

to attempt the introduction of legislation of this kind. In 1919 a Bill was introduced in the Ontario Legislature, but it was killed, chiefly by the mining interests who believed that their ability to obtain capital was thereby threatened. Previous to this, in 1914, a Bill was introduced in the Nova Scotia Legislature. This also met with a violent death. The Province of Manitoba, in 1912, enacted a regulatory law. This was followed by Alberta in 1916 and Saskatchewan in 1920. Other than the above there is no such law in the Dominion.

At the present time there are two general types of this legislation. The first is commonly known as a Fraud Act, which is in force only in three States, viz., New York, New Jersey, and Maryland. The second type is a regulatory law which, with modifications, is in force in some forty States and the three Provinces of Canada above mentioned. The most comprehensive Act of this class is probably that of Illinois. The Commonwealth of Massachusetts has an Act which is a combination of the Fraud and Regulatory types.

Under a Fraud Act, if it appears to the Attorney-General that any person is employing any device to defraud, and he believes it to be in the public interest that an investigation be made, he may require such person to file with him a statement as to all the facts. Then he may either issue an order requiring the guilty party to desist from his fraudulent practice or may bring an action to enjoin him. The objection to this type is that complaints are seldom made to the Attorney General until the security has been sold and the purchaser has brown suspicious of his holding. It is usually then too late to take effective action, as the sale has been completed and the promoter has left the jurisdiction. To use the words of the Governor of Maryland—one of the States where a Fraud Act is in force—it is a case of "locking the stable after the horse has been stolen." The time to prevent the fraudulent promotion of companies and the sale of worthless securities is at the inception of the enterprise. Prevention is not effected by legislation which merely punishes the wrong-doer after he has pocketed his ill-gotten gains and departed for green fields and pastures new.

It will be said that the Criminal Code provides for cases of

fraudulent representation. That is quite true, and if those provisions of the Code were enforced some of the evils would be met. The fact, however, would still remain that the offence must be committed before the Code can be put in motion. There is also the further difficulty of obtaining evidence in cases of fraudulent misrepresentation; for example: the promoter employs an agent; the agent makes a certain representation and sells stock on the faith of it; the representation is untrue. Upon a prosecution, the agent denies making the representation and the promoter denies authorising him to make it; result, none. Nor must it be forgotten that dishonest promoters or salesmen seldom wait quietly for the service of a summons which may result in a heavy fine or imprisonment. Such legislation would seem to be not even a deterrent.

The more common form of Blue Sky legislation is the regulatory type, which is in force in the large majority of the States and in three of our own Provinces. Under it all securities must be passed upon by a Commissioner or Board before they may be sold, and a certificate is issued authorizing their sale. This certificate may be revoked upon evidence being shown of fraud. It is, however, largely used as a convincing argument to the would-be purchaser that the securities have not only the endorsement but have actually the guarantee of the State, and the certificate thereby becomes an agent of positive fraud.

Under the majority of regulatory Acts certain securities are exempt from the operation of the Act. These comprise such securities as, from their inherent nature, do not pre-suppose fraud. Some States have a very wide list of exemptions which they justify on the ground that legitimate business is thereby hampered as little as possible, while, at the same time, most of the crooked transactions are covered. Be that as it may, the principle of having exempted securities is undoubtedly growing in favour. An attempt is now being made in the United States Congress, with very great prospects of success, to have a list of exemptions which it is expected will be adopted by the various States. This would simplify the work of financial institutions and brokers in the same way as the work of insurance companies has been simplified by the Statutory Fire Conditions,

which are now almost uniform in the various Provinces, and which, within a year, will probably be uniform throughout Canada. Entire uniformity of laws will never be obtained, but every attempt in such direction should be strongly endorsed.

The Ontario Companies Act (ss. 99 to 110) requires that certain information be filed with the Provincial Secretary and that a prospectus must be issued. There is, however, no systematic supervision of the information filed and it need not be under oath. The obvious result is that much of the information is unreliable. While there have been some prosecutions for false information filed they have not been sufficiently frequent to deter the fraudulent promoter. The information required to be filed is taken almost verbatim from the Imperial Act, and much is now obsolete or inapplicable. Moreover the penalty provided by the Ontario Companies Act for its infraction is entirely inadequate. At present a promoter is able to file a prospectus containing false information, on the strength of which he may sell tens of thousands of dollars worth of stock and not be found out until he has unloaded his supply and left the jurisdiction. If he is unlucky enough to be caught, or if he is foolish enough to remain in the Province to be prosecuted, he may incur a penalty (mark it well!) "not exceeding $200." Even this penalty he may escape under certain circumstances.

The report on Blue Sky legislation recently laid before the Legislature, suggested that the prospectus provisions be taken out of the Companies Act, remodelled, made under oath, and enforced by means of suitable penalties which, in case of a fraudulent statement, would be properly severe. Any legislation that attempts in any way to regulate or control the issue and sale of securities should be directed towards fraudulent promotions, which should be drastically dealt with, while the honest promoter who makes an unintentional error should be treated leniently. The real object of such a law should be to keep out the fraudulent promoter without in any way hampering legitimate business.

The Bill introduced by the Attorney General differs from both the Fraud and Regulatory type. Under it any person issuing or selling securities must file certain specified information with

an officer known as the Commissioner of Securities. Although it is not necessary (as under a Regulatory Act) that all securities should be submitted to the Commissioner before being sold, the Commissioner has power at any time to investigate any security, and if he believes it to be fraudulent he may prohibit its sale. He may also prosecute for fraud in connection with the sale of any securities. The information above mentioned, which is filed with the Commissioner, is now called a "statement" instead of a "prospectus," which latter word is used in the Companies Act. The word "prospectus" is now confined to the document upon the faith of which the public subscribes for stock, and it must contain all material information that is in the statement. The prospectus must be given to every purchaser of securities in order to bind him.

A prospectus must bear the name and address of the broker. If the issuer is not domiciled in Ontario or has failed to issue a prospectus it must be issued by the broker who intends to offer the securities for sale.

Every broker and salesman (other than a salesman resident in Ontario and acting for the broker) must be registered. In this way those who sell securities are kept under a measure of supervision and control. The Commissioner examines into the reputation of the applicant for registration and may refuse registration for certain specified reasons. If the applicant is not resident in Ontario he may be required to furnish security in the sum of $10,000.

A graduated scale of penalties is provided for infractions of the Act. In case of fraud the maximum penalty is $25,000, which is none too much in view of the fact that a fraudulent promoter may have obtained much more than this amount from a too-confiding public.

Objections have been urged that such legislation is an invasion by the State of private business and an additional regulation by the State of individual enterprise; that it savors of paternalism; that the citizen has a right to spend his money as he chooses, and that investors should be allowed to exercise their own discretion as to the character of the enterprises into which they put their money. Those who urge the above views claim that when the

State undertakes to regulate by legislation the sale of fraudulent securities it is entering a new field, and that there is no obligation on the State to exercise any control over the sale of these securities. Those persons fail to realize that the corporation whose securities are being controlled has been created, and the issue of its securities authorized and sanctioned, by the State.

The right of the State to interfere by legislation is summarized in a report made in January, 1921, by a Special Commission appointed by the Governor of Massachussetts to investigate the sale of corporate securities. The report says:

"Since the State authorizes the issuance of fictitious or watered stock, it must follow that it is the duty of the State to prevent the sale of such securities until the State determines that they are not fraudulent. The State creates the securities and places them in the hands of the fraudulent promoter, who in turn distributes them to the public. Any additional legislation to check the sale of fraudulent securities is nothing more or less than an effort by the State to limit the use by fraudulent promoters of the false tokens which the State itself creates."

All legislation interferes more or less with the liberty of some subjects in order to protect others, even from their own folly. Although an investor should have the right to choose his investments it is not unreasonable that from such investments should be eliminated as far as possible all fraudulent elements. The late Theodore Roosevelt briefly summarized the idea by saying, "It is the business of the State to see that every man gets a square deal."

A report issued by the United States War Corporation, which had complete power to determine what securities should be issued and sold in the nited States during the late war, states officially that the people of the United States are being defrauded out of more that $500,000,000 a year by the sale of worthless and fraudulent securities. If Canada suffers equally in proportion, the necessity for some legislation would appear to be more than desirable. At the present time Canada, and especially the Province of Ontario, is a happy hunting ground for company promotions of every kind, very many of which are far from being honest. One reason for this condition is that

nine-tenths of the States of the United States have made dishonest promotion more difficult and less profitable than it used to be. The result is that the vendors of these wares find a ready market in those of our Provinces which have no such legislation. And this situation has been intensified as other Provinces and States have passed legislation. It may be noted that another Province and several additional States are preparing to introduce a measure of this kind.

Certain evils in connection with fraudulent promotion and stock selling cannot be met by any enactment within the authority of a Provincial Legislature. These are the use of the mails and advertisements in newspapers and periodicals. Only Dominion legislation can prevent letters or circulars from being sent through the mails from a Province where no such legislation is in force into a Province or State where there is legislation. Similarly, stock may be sold by means of advertisements in newspapers circulated in a Province which has such legislation although the newspapers are published outside the Province.

The situation seems to call for a remedy. Whether or not the Bill recently introduced will provide such remedy remains to be seen. It should at least be given a trial. If found wanting it can be repealed, but if it is found to be productive of good results, it can be strengthened, if necessary. It has never been supposed that legislation can cure all the evils aimed at, but if a large amount of money is saved to the public the legislation will have been worth while. The legal profession is the best qualified to criticise the proposed legislation, to point out the difficulties, and to suggest the remedies.

Whether or not the Bill now before the Legislature will become law rests with that body, but whatever the outcome may be, the signs of the times would seem to indicate that some form of this legislation must, sooner or later, be enacted.

A. H. O'BRIEN.

The above article was written by Mr. A. H. O'Brien, M.A., formerly Law Clerk of the House of Commons and Counsel to the Speaker. He was specially retained by the Ontario

Government to investigate the general subject of legislation for the protection of the public against spurious joint stock company flotations, with special reference to existing legislation in the Provinces of Canada and the States of the United States. Mr. O'Brien's report, which has recently been printed by order of the Legislature, gives a very complete summary of the subject and embodies the concensus of opinion of the various jurisdictions which have enacted this species of legislation. A perusal of this valuable and exhaustive report will be found exceedingly interesting to those who are in any way concerned with this subject and contains a mass of information no where else obtainable.

DOCTORS IN THE WITNESS BOX.

By Hon. Mr. Justice Riddell.

Every now and then appears an article, almost invariably in a medical journal, upon this subject; and quite invariably the article contains a complaint that lawyers have a privilege which doctors have not.

This kind of "grouching" does no good, and it may do harm. Perhaps there may be some advantage in clearing up a very common misunderstanding of the law. The latest article on the subject which I have seen—"The Hospital" for July 16, 1921, says: "The lawyer has from time immemorial enjoyed the privilege of refusing to disclose his client's secrets. . . . A doctor is surely entitled to no less protection"—and the lawyer is represented as "claiming for himself a privilege which he denies" to the doctor. A more serious misrepresentation of the fact could scarcely be made—the lawyer has not and never had any such privilege, and what is called improperly his "privilege" is in fact a burden which I have never known any lawyer to enjoy—I know I did not when at the Bar.

The truth is that the privilege is the privilege of the client and of the client alone—the client has in law the right to compel to keep silent certain matters, not only an attorney, solicitor or counsel, but also his solicitor's (I shall use the word "solicitor" to cover "attorney" and "counsel" as well) clerk, his own or his solicitor's interpreters or other agents of communication—and

even any person believed by him to be a solicitor and consulted by him as such.

But the solicitor is not at all bound to keep all his client's secrets.

The rule is this—where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, unless the client waives the protection. Every word of this rule must be borne in mind —there is nothing superfluous. In the first place it is to be observed that the client may at any time waive the privilege—the solicitor cannot then set it up—it is not at all for the solicitor's advantage or protection, but the client's.

There is no privilege where the advice is sought for the purpose of committing a crime or violating the law. If a client wanted advice as to how he could safely (say) suppress a will, raise money on a forged will or other forged document, or forge a document of any kind—or if he wished to evade his duty as a trustee or get around the succession or income tax—or if he wished to dispose of his property in fraud of creditors, there would be no privilege. "The privileged relation of attorney and client can exist only for lawful and honest purposes," and the solicitor "may be required to disclose whatever act was done in his presence towards the perpetration of the fraud" or crime.

What is to be kept secret is something that comes from the client either directly or through agents, interpreters, etc. Anything told to the solicitor by third parties, however much for the client's advantage, must be revealed—and anything which the solicitor finds out himself by enquiry of any kind in the same case; of course he will not be allowed without the client's consent to tell what he said to his client in the way of advice, etc.

The communication must be confidential and made for the purpose of legal advice—the mere relation of solicitor and client does not raise a presumption of confidentiality, and "the moment confidence ceases, privilege ceases." For example, the presence of third parties in no way interested may destroy the privilege,

a communication on the public street and in the presence of a third person may show by its circumstances that it was not confidential—statements to a third person are not privileged simply because they are made in the presence of solicitor and client. So, too, if the statement be irrelevant to the matter upon which advice is sought, it is not privileged, for the cleint is not then seeking legal advice on that.

It is not cqnfidence placed in another alone which justifies privilege—there is no privilege in confidential communications to one's clerk no matter how confidential and trusted he may be, to a trustee, to a commercial agency, to a banker, to a journalist, to a telegraph operator, to the closest and most intimate friend.

Confessions to a priest are not on quite the same footing as those mentioned. British principles are now, and for many years have been in favour of perfect religious tolerance—it is recognised that the religion of the Roman Catholic and some others, compels them to confess sins to an ecclesiastic. While the law does not make such a confession absolutely privileged—as it might well do as being made under moral compulsion and in performance of a religious duty—judges are very loath to require disclosure by the father confessor. In my own experience, I have more than once said on the Bench that I would direct disclosure if it were pressed, but suggested that the confidence be respected; and in every case counsel has recognized the propriety of doing so.

The position of the priest and that of the lawyer are not the same, and it is misleading to suggest an analogy which does not exist.

The erroneous idea that the lawyer has any privilege is an instance of "fireside law" which, like so much other "fireside law," is a relic of the past. Two hundred years ago, the privilege was supposed to rest upon the honorable obligations of the attorney, and upon his oath on being admitted — it was his privilege; but nothing of the kind has been heard of for a century and a half. In those olden times, the courts recognized the rule of honour among gentlemen as being sufficient to entitle any one to decline to make public a confidential communication of any kind. Now neither the feeling of honourable obligation nor even

an oath will justify any witness in concealing communication made to him.

I am not concerned with the theories and principles underlying the privilege in question—I had nothing to do with making it, nor had any living judge—I never liked it when I was at the Bar, it is no advantage but rather a burden to the practising lawyer, and is maintained from grounds of public policy. No authority but the Legislature can abolish it, and I see no movement in that direction—the people who are the final court of appeal seem to be satisfied with it.

Apply now to medical men, the rule of privilege in attorney and client. The doctor would be not only entitled, but (in the absence of the patient's consent), compelled, to keep secret in the witness box communications made to him (1) by his patient, (2) seeking medical advice from him, (3) the communications being made in confidence, (4) and being relevant to the purpose. And the patient would have the same exemption, but not the same compulsion. The doctor would not be permitted to keep secret what he found out himself by physical or other examination or enquiry, what he was told by uninterested third parties, what was not relevant to the purpose, what was told in the presence of others not interested.

A medical man called upon to set a broken leg asks the patient how it happened—the patient says, "I fell off a wall", privileged, and adds "I was trying to break into a warehouse," not privileged. The doctor finds the bones in a certain condition, not privileged; the policeman says, "We found him lying on the sidewalk under Mr. Smith's warehouse"—the doctor must so state.

The now well known case of Dr. Elliott, of Chester, England, seems to have excited considerable comment. In a divorce suit, Dr. Elliott was compelled to state that one of the parties had had venereal disease. The doctor explained that he and other medical men formed a particular clinic on the distinct understanding that professional secrecy would be observed; he pointed out a regulation under the Public Health Act; he said that to give the evidence required he would have to violate one of the earliest and most sacred principls of the medical profession, one

which the profession held dear—all that did not avail against the right of the other party to the suit to have the truth told, and Mr. Justice Horridge directed him to answer.

It is perfectly certain that the privilege claimed by Dr. Elliott went far beyond anything claimed in the case of a lawyer for a century and a half.

He was asked to state not what his patient had told him, but the physical condition in which he found him—he wished to shelter himself behind some agreement, binding no doubt in honour, and, perhaps, medical ethics, neither of which could be allowed to prevail in the case of a lawyer.

The claim now set up, is to make doctors a privileged class of the community above bankers, financial agents and other confidential persons.

If the profession desires that this be brought about, there is no use girding at the courts who did not make and cannot change the law—no use in looking askance at lawyers as though they were claiming a privilege and keeping doctors under—no use lamenting in medical journals the unhappy conditions of the profession. Go to the people direct, state what it is you wish, convince them, or even a few of them, that such a change would be for the advantage of the people and the thing would be done. Nay, convince the Legislature, or even a reasonable number of the legislators, and the end would be achieved—it is not hopeless, New York has such a law—try it in Ontario if you really think that the people would be advantaged. Before you make the attempt be very sure that you really desire the change.

But it is quite hopeless to expect that any court or any legislature in these days will go back to the archaic theory or pay any attention to the gentleman's sense of honour or a voluntary promise or oath, Hippocratic or otherwise, as any excuse for depriving a citizen of his right to have the full truth under oath in a court of justice.

GOVERNMENTAL RESPONSIBILITY.

The Law Times (Eng.) again criticises adversely the continuance of the vicious practice of appointing judges to perform duties not connected with their judicial duties; Mr. Justice McCardie having been recently directed to conduct the Clones Enquiry, whatever that may be.

Our contemporary admits that "during the war every one had to give of their best to their country; and the Bench rendered invaluable services outside their strict legal duties." The war, however, is over for the present, and it is time judges were permitted to attend to the business properly assigned to them.

We wish we could say that this practice in this country had only begun in 1914. It had done plenty of harm before that. We do not propose, however, to refer to this now, being in hopes that the Government and the judges have had a change of heart in view of recent legislation.

As we live in the days of what is called Responsible Government, it would be well to remember an axiom that admits of no argument, viz., that persons elected by the people to govern should govern. It is convenient occasionally to evade responsibility, and there may sometimes be a good reason for appointing a commission, but in that case, to carry out the theory of responsibility, the finding or report of the commission must become the finding and voice of the Government and not be used for its protection or to throw on the commission the responsibility which belongs to the power which appointed it.

In reference to the pernicious practice of creeping for protection under judicial robes, may we make a suggestion, or rather repeat what we have already said. If men of legal training are wanted to conduct enquiries or sit as commissioners there are many men in the profession quite as competent for such a position as our judges and of equally high character for probity who would be suitable for such duties.

APPEALS TO THE PRIVY COUNCIL.

May we be pardoned for reproducing some further interesting literature on this subject taken from our most valued contemporary The Law Times of England (vol. 153, u. 204).

To begin with, it copies with approval from our pages the remarks of Hon. Louis A. Taschereau, Premier of Quebec, in

which he enlarges upon the advisability of retaining the right of appeal.

In the same journal appears a paper by Arthur Robinson, C.M.G., Attorney-General of Victoria, and President of the Law Institute there, discussing appeals in constitutional cases. At the conclusion of an exhaustive paper he refers to the eloquent remarks of Lord Shaw of Dunfermline when extolling the beneficial influence of the Judicial Committee of the Privy Council, who spoke as follows:—

"The other afternoon, with a sigh of relief, for it has been a laborious term, the sittings for the year of the Judicial Committee came to an end. The two last decisions just before we rose awoke curious reflections. Not unseasonable thoughts they were, even for Christmastide. One of these cases was a conflict between a native prince and a municipality in Oudh as to the right of the latter to drive a street through a *Gunj*, or market-square, on the ground of which, beneath the fierce rays of the Indian sun, you might see the natives exposing their grain in piled-up heaps. The other was a contest between a wealthy railway and a great corporation, and it was, if you please, about the clearing away of snow from the tracks of a street railway in the City of Toronto! At one bound, so to speak, from the sweltering heat of India, away to another continent, to the chill and rigour of Canadian winter! And all these contentions to be laid to rest in that little room in Whitehall which you know.

"Suddenly, as I felt that 'the time draws near the birth of Christ,' I realised that the quiet, far-reaching task in which the Privy Council is engaged may be—must be—a part of that process, in which, through instruments ever so imperfect, the perfect scheme of peace on earth may be lifted forward in the practice and affairs of men. Quiet, did I say? Yes: its business is the search for truth; and the stuff which it works in is justice. A grave task and austere, according so much with simplicity and quiet that there is no place there for even the paraphernalia of a Court. Far-reaching, did I say? Yes. From that little room in Whitehall is wielded a jurisdiction over one-quarter of the population of the globe. To that little

room come able, learned men, widely different in race and creed and colour, all to help in that task, fundamentally human, fundamentally divine, the search for truth, the doing of justice. . . .

"Over and over again there come before the Board questions, antagonisms, rivalries, jealousies, which in former times would have driven races, provinces, kingdoms, to rancorous and bloody wars. These problems are settled by the arbitrament of equity and by a justice so manifestly achieved without fear or favour that their solution is accepted with a loyalty at once respectful, real, and complete. So that one can feel that peace is being won and kept by justice—a peace more enduring than any that could be imposed even by the rod of Imperial power."

MORAL DAMAGE.

Those who remember the history of the Jameson raid of 1895 wil recollect that much mirth was occasioned by the inclusion in President Kruger's claim for damages of a large sum under the head of "moral damage." Indeed the expression is little used in this country and so it easily lent itself to jesting. *Dommage moral* is, however, a reality, meaning injury to honour, affection or other proper feeling and forms the basis of our law of libel, of Lord Campbell's Act, of the Slander of Women Act of 1891, of breach of promise actions, and of actions against bankers for wrongly dishonouring cheques, and in all cases without special damage being proved; while in the practice of the courts actual damage is often appreciated at an enhanced figure when the conduct of the defendant has been shockingly bad or the feelings of the plaintiff have been injured. In the former case the practice of juries, sometimes encouraged by judges, exhibits the common desire to punish a wrong-doer wanting in moderation. Thus, the plaintiff sells his honour for riches which he has done nothing to earn, the jury has gratified their vindictive righteousness, the defendant learns that gross improprieties can be weighed against gold and the functions of the criminal courts have been usurped. Here is judge-made law of the doubtful kind under which punishment is meted out in a civil court and

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children (art. 1118). Actions for wrongs may be brought against universal successors (art. 1132), but on the other hand universal successors can only recover damages for moral injury (this being the only head of the claim) when the action has been begun by the deceased (art. 1133). Title IX. treats of damage caused by illicit acts, and the reader must remember that "act" includes act of omission. The important article is 1143: "Every author of an act which by his *culpa* or negligence occasions damage to another is bound to repair the prejudice, &c."

There are, however, many systems of law in which the codes make no specific reference to moral damage, and prominent among them is the French Civil Code. The terms, however, in which wrongs are made justiciable in the civil courts are wide; the two material articles of the code being No. 1382: "Any act whereby a person causes damage to another binds the person by whose fault the damage occurred to repair such damage:" and No. 1149, "Damages and profits are due, as a rule, to the creditor for the loss which he has suffered and the gain of which he has been deprived" (in consequence of a breach of contract), &c.

On turning to Baudry-Lacantinerie, vol. 15, p. 559 we find that most jurists are of opinion that moral damage is the proper object of pecuniary reparation, and on the following pages cases in the courts are quoted which show that this view is supported by the majority of judgments. Thus, damages have been given for defamation, adultery (both wife and co-respondent being liable), and cases are cited of indemnities recovered for the moral prejudice caused by accidents to the near relatives of the injured; other cases are quoted, however, in which the sum of money allotted has been purely nominal and evidently intended solely to cause the defendant to bear the costs of the proceedings. This, of course, is an unsatisfactory result, but at any rate the principle is admitted, even though the calculation of the pecuniary equivalent of the suffering caused was beyond the appreciation of the courts. In an action for breach of contract actual damage must be proved, even in such an action as that against a banker for wrongly dishonouring a cheque (Baudry-Lacantinerie, vol. 12, s. 480). The influence of French

cases of construction is very considerable in those countries which have adopted relevant articles similar to those quoted from the Code Napoleon. Thus Senor Roberto Butron, writing in the Revista de Derecho (Santiago) concludes that the Chilean courts would, and do on the whole, follow the same construction (vol. 17). At p. 51 he quotes certain Italian decisions, and among these, one of the Brescia Tribunal of the 19th March, 1890, condemning an adulterous wife to compensate her husband for the damage which he had suffered through finding himself alone, without family and without power to reconstitute it.

It is interesting to refer to the Japanese Civil Code which contains specific prescriptions relating to our subject. Art 710 : "Whether the case be one of injury to the person, liberty or honour of another, or of injury to his rights or property, a person who has, under the provisions of the preceding article, rendered himself liable for damages must also give compensation for injury other than to rights of property. 711. A person who has caused the death of another must give compensation for damage to the parents, to the husband or wife, and to the children, even in cases where no injury has been done to their rights of property. 723. In the case of a person who has injured another's honour, a court of law may, on the application of the injured party, either in lieu of compensation for damage, or in addition thereto, order suitable steps to be taken for the retrieval of the injured party's honour.

In the German law, as in many other systems, moral damage can only be claimed in addition to damage to person or estate. False imprisonment is an exception and certain sexual offences against females (B.G.B. 847, 1300) such as seduction under promise of marriage, by deceit or menace or abuse of power.

It is difficult not to feel some sympathy with the arguments that no damages should be given for moral injury (1) because the latter is inappreciable in money; and (2) because damages are a penalty, and as such more proper to a criminal law.

It may not be superfluous to point out that many wrongs which occasion moral injury are susceptible of punishment under the penal law and in some countries the criminal courts have jurisdiction to award damages in addition to punishment.—*Law Times.*

LAW OF DIVORCE IN CANADA

By C. S. McKee, Barrister.

(*Continued from March issue*)

In Canada, as in Great Britain, the procedure has always been for private bills to originate in the Upper House. Before 1847, no standing orders on the question of divorce bills appear to have been in existence; the practice was merely to follow British procedure. In 1847 standing orders were adopted; in all unprovided cases reference was to be had to the procedure of the House of Lords; however, the latter was not followed absolutely, the outstanding example being that in this country a wife could get a divorce from her husband on the sole ground of adultery. These Senate rules were amended in 1876, 1888, and again in 1906, and the subject of divorce is now dealt with by rules 133 to 152. These twenty rules are published under separate cover and are available upon application. The only amendment affecting jurisdiction was in 1888. Under the former practice, the Senator in charge of the bill moved immediately after the second reading the appointment of a Select Committee of nine, and also named its members. At the instance of Senator Gowan, who had been a Judge of the district of Simcoe from 1843 to 1883, rules were adopted in 1888 providing for the formation at the beginning of each session of a committee of nine to whom all questions of divorce are referred with a view to relieving the Senate itself of some of the duties which under the old rules had devolved upon it. At first, an attempt was made to select the committee on the basis of provincial representation, but on account of the objection to divorce of Roman Catholic Senators, it has not always been possible to adhere to this plan.

Applications for divorce come under the head of private bill legislation. The practice is now governed by the set of rules adopted in 1906; apart from these rules the general regulations regarding private bills apply if not in conflict with the rules. A committee of selection of nine is appointed at the first of each session to nominate the Senators to serve on the several standing committees—among others, the one on divorce, which consists of nine. Every standing or special committee meets, if practicable, on the day after its appointment, and chooses a chairman. A majority of the committee constitutes a quorum. Senators who are not members of the committee may attend and

may speak, but may not vote; in practice members of the House of Commons may also attend. Although R. 152 provides that in cases not covered by the rules the general principles upon which the Imperial Parliament proceeds in dissolving marriages shall be followed, the rule has in practice been regarded as permissive only and not imperative, and the Senate has never felt itself bound by the decisions of the House of Lords. Another similar defect is the fact that the Senate observes precedents only when it chooses to do so; unlike a court of law, it is not bound by them; and the result is that solicitors are left in the embarrassing position in advising clients, that what the Senate has done before is an indication merely and not a guarantee as to what it will do again. Although it probably is impracticable for Parliament to limit its almost omnipotant powers by adopting a rule that precedents are to be followed in the manner in which they are followed in courts of law, yet the practice of the latter in the matter might well be more closely adhered to than it is at present.

The House of Commons, not being particularly concerned with divorce bills, has adopted no special rules relating to them, but has left them to the practice relating to other private bills.

There is of course no appeal from the action of Parliament --except to have the bill introduced again at a subsequent session.

The same principles in regard to proving a legal marriage, the unimportance of the place of commitment of the offence, and domicile as were noticed above in connection with Provincial Divorce Courts apply to Parliamentary divorces.

4. Jurisdiction. Declarations of Nullity.

By those not connected with the legal profession, declarations of nullity are frequently confused with divorce. In their practical effects, they may be somewhat similar, but technically there is a vast difference; and cases do occur where this technical difference impresses itself in a far-reaching manner—e.g., as regards legitimacy of issue, and as regards re-marriage prior to the declaration. Divorce starts with the basis of a legal marriage; a declaration of nullity has as its basis the absence of a legal marriage- the absence of the status of husband and wife. In the Provinces where there are Courts with jurisdiction over divorce, it is not surprising that these Courts have jurisdiction to hear applications for declarations of nullity; in On-

tario and Quebec, the exact legal situation is not very clear; and in so far as it is settled, it is probably not just what might reasonably be expected—the decisions of lower Courts are conflicting; of Appeal Courts are lacking in detail.

The theory of annulment is that marriage although accompanied by religious observances is for judicial purposes a contract, and can like other contracts be questioned as to its validity. Anson gives as the elements of a valid contract: 1. Offer and acceptance. 2. Form and consideration; 3. Capacity. 4. Genuine consent. 5. Legality of object.

In connection with the contract of marriage these may be regrouped and enlarged as follows:

1. Genuine consent—error—as to person, as to ceremony; duress; undue influence.

2. Form—as laid down by provincial legislation in regard to solemnisation.

3. Capacity—infants; lunatics; intoxicated persons; impotent persons.

4. Legality of object—consanguinity; bigamy.

A sub-division into void and voidable has been attempted by some writers, but such a classification would, besides being confusing on account of different legislation in the various Provinces, appear to be unnecessary, since in practice whether void or voidable, the effect never comes into operation until the validity has been attacked and settled.

1. Consent. Error in regard to the person must be as to identity and not as to condition, either social or physical. Misrepresentation, even though fraudulent, unless it results in such an error is not a ground for a declaration of nullity. The Quebec Civil Code differs from the English Common Law on this subject in that the former provides that after 6 months cohabitation and after having acquired full liberty or become aware of the error, the person coerced or in error cannot have the marriage annulled. (arts. 148-9).

2. Form. Obviously parties are not married unless they comply with the provincial law in regard to solemnisation. This phase of the question has been of much more importance in Quebec than in the other Provinces. A Papal decree, known as the Ne Temere, in 1908, tried to make marriages of two Roman Catholics or of one Protestant and one Roman Catholic except by a priest invalid. It was held by a majority of the Judges of the Supreme Court of Canada to be a question of conscience

only and not binding on Quebec Courts. However, in *Re Marriage Law of Canada,* 7 D.L.R. 629, [1912] A.C. 880, the Privy Council held that the power of the Provinces to legislate in regard to solemnisation covered the right to say certain ministers only should be competent to perform the ceremony of marriage for certain persons, and that non-compliance would render the marriage null and void. The matter has recently been before the Privy Council again, (*Tremblay Marriage* case, 58 D.L.R. 29, [1921] 1 A.C. 702, 27 Rev. Leg. 209), and it has been held that the marriage of two Roman Catholics or of a Roman Catholic and a Protestant by a properly authorised person other than a Roman Catholic priest is not a ground for a declaration of nullity.

3. Capacity. The English Common Law which says that a man under 14 and a woman under 12 cannot marry except to prevent illegitimacy is in force in Canada, except in Ontario, where the age limit is 14 for both. (R.S.O., 1914, ch. 148, sec. 16), and in Manitoba, where the age limit is 16 for both, (1906, (Man.) ch. 41, sec. 16). All Provinces have passed legislation to discourage marriage by very young people, but in most cases this legislation does not go so far as to affect legality once the contract has been entered into. In Quebec and Ontario the statutes go further. In the former, a marriage where the parties are under 21 years of age contracted without the consent of the parents can be attacked only by those whose consent was required, and then only within 6 months of the ceremony. In Ontario, by R.S.O., 1914, ch. 148, sec. 36, when a form of marriage has been gone through between persons either of whom is under 18 without the consent of the father if living or of the mother or other guardian if he is dead, the Supreme Court has jurisdiction in an action brought by either party who at the time of the marriage was under the age of 18 years to annul the marriage, provided that such persons have not after the ceremony cohabited together as man and wife and that the action is brought before the applicant is 19. These provisions came before the Courts in 1916 in *Peppiatt* v. *Peppiatt* (1916), 30 D. L.R. 1, 36 O.L.R. 427. It was the case of a marriage without consent on the part of her parents of a girl under 18, and came on for trial before Meredith C.J., C.P., 34 D.L.R. 121, who held that the section of the Ontario Marriage Act R.S.O. 1914, ch. 148, requiring consent was *ultra vires,* and who sent the case on to the Appellate Division, it being the first of such cases to

go there. The trial judge said at p. 123: "This is another of those cases which, though of infrequent occurrence in this Province, invariably, indeed necessarily, direct attention to the uncertain and unsatisfactory state of the marriage and divorce laws of Canada whenever they do occur; uncertain and unsatisfactory not only in the conflicting and indecisive character of the case-law upon the subjects, but equally so of the statute-law; and so it has been for many years, notwithstanding the fact that it is a thing regarding which it is of the utmost importance, not only to the persons directly concerned, but to the public as well, that there should be certainty and certainty of a satisfactory character . . How can it be but unsatisfactory for man and woman to be uncertain whether they are really husband and wife; whether they are lawfully married to one another; as well as whether any of the ordinary Courts of law have any power to settle the question? . . . The cases are very much opposed to one another; or rather, the expressions of judicial opinion in them are; and they are less helpful as none of them was ever carried to a court of appeal."

With the desirability of a clear decision so definitely set out by the trial Judge, it is to be regretted that the reasons for the decision of the Appellate Division are not more clearly set out than they are. The Appellate Division felt themselves bound by the decision of the Privy Council in *Re Marriage Law of Canada*, 7 D.L.R. 629, [1912] A. C. 880, which held that everything which is included in the solemnisation of marriage is excepted from the exclusive jurisdiction vested in the Parliament of Canada by sec. 91 (26) of the B.N.A. Act, and that this enables the Provincial Legislature to enact conditions as to solemnisation which may affect the validity of the contract. They then considered the question of whether the Marriage Act makes the consent required by its 15th section a condition precedent to a valid marriage. The action was dismissed, it being held that the consent required by the Marriage Act was not a condition precedent to the formation of a valid marriage but merely a direction to the issuer of marriage licenses. The question of the validity of sec. 36 was not decided. Jurisdiction was held to be conferred by sec. 16 (B) of the Judicature Act. This decision appears to have found jurisdiction elsewhere than was found in *Lawless* v. *Chamberlain* (1889), 18 O.R. 296, and to have overruled *Reid* v. *Aull* (1914), 19 D.L.R. 309, 32 O.L.R. 68, where Middleton J. said, at p. 78: " . . The power to

make declaratory decrees conferred by the Legislature is not to be exercised in respect of matters over which the Court has no general jurisdiction."

Where there is insanity—not merely mental deficiency—or drunkenness, there can obviously be no consent to the contract —*A.* v. *B.* (1911), 23 O.L.R. 261, and *Roblin* v. *Roblin* (1881), 28 Gr. 439.

Another capacity essential to the marriage contract is the capacity for the consummation of the marriage, the lack of which is known as impotency and is ground for a declaration of the nullity. It must exist unknown at the time of the marriage; physical incapacity arising subsequently is no ground, as the parties have taken each other subject to all the vicissitudes of life which may arise, but on the belief that all is correct at the start. Moreover, in cases of subsequent impotency, the marriage would already have been consummated. The impotency must be incurable—i.e., the contract must be incapable of completion. Usually it will be apparent to medical authorities; but in some cases, it cannot be detected by them; the practice in such cases is to recognise the claim after the lapse of 3 years. In England the practice has been that the fit party must be the petitioner; but in some cases this rule has not been followed, as where the unfitness was not known to the deficient party. In Quebec, the marriage can be annulled for impotency, natural or accidental, existing at the time of the marriage, but only if it be apparent and manifest; the jurisdiction can be invoked only by the party who has contracted the marriage with the impotent person, and only before 3 years have elapsed. According to Bishop, there were in England between 1858 and 1872, 15 reported cases.

4. Legality. In England since Lord Lyndhurst's Act in 1835, (Imp.) ch. 54, marriages within the degrees prohibited by 1537 (Imp.) ch. 7, sec. 7, are void *ab initio* and not merely voidable. The Acts of 1835 however do not apply to many of the Provinces of Canada, and therefore in these Provinces such marriages are merely voidable. In *Cox* v. *Cox* (1918), 40 D.L. R. 195, 13 Alta. L.R. 285, to take only one case, the Court of Alberta made a declaration of nullity in connection with a bigamous marriage.

Very similar to a nullity suit is a jactitation suit. It is available to the man or to the woman. The former may complain that the latter has improperly boasted of being his wife

and may ask the Court to silence her. She may answer the charge by denying the boasting, by setting up a marriage, or by pleading his permission to assume the character of wife. It has rarely been resorted to in England in modern times, and never in Canada or the U.S.A.

So much for the grounds for declarations of nullity as they are generally recognised at present. Are these grounds too broad or too limited, and are they the only grounds which should be recognised? Should legislation be passed abolishing some of the existing grounds? At the basis of these questions there lies —and always in the past has lain—the desirability of releasing the person from an unhappy contract which was never contemplated or understood, of limiting the number of children of an undesirable physical type which are brought into the world, of limiting the number of children declared to be illegitimate, and of limiting the type of immorality which enters into marriage, thinking that when tired of it, it can easily be annulled. Cases discussed above under the heading of consent would appear to be ones which should be annulled only if action is brought before the marriage has been confirmed by the acts of the injured party which would be within a reasonable time after the error, or duress, etc., has ceased; but if brought within such time, then even though the marriage has been consummated before the error, duress, etc., ceased. The action should lie only at the instance of the injured party; the marriage should be voidable not void. Since ignorance of the law can never be a defence, since the question is also one of crime, and since the State is presumed to punish all crimes of which it has knowledge, the non-observance of the formalities provided by law for marriage should be ground for annullment only at the instance of the Crown, except when the ignorance is one of fact only and not law, in which case the party acting in such ignorance should be able to bring an action. It would appear to be advisable in most cases in the interests of legitimacy for the Crown to compel the parties to go through a properly binding marriage ceremony, and in fact it would be wise if as well either party could take action to compel the other to complete the contract in regard to form. The classes under the heading of capacity are slightly more complex as regards estimation, and can probably best be considered under headings.

(To be continued in May issue)

Review of Current English Cases

WILL—REVOCATION BY MARRIAGE—EXCEPTION IN CASE OF APPOINTMENT IN EXERCISE OF POWER—VESTING OF APPOINTED INTEREST AT AGE OF 25—WILLS ACT 1837 (1 VICT., C. 26), S. 18—(R.S.O. c. 120, s. 21 (1) (c))—PERPETUITY.

In re Paul; Public Trustee v. *Pearce* (1921), 2 Ch. 1. Two points of interest are determined in this case by Sargant, J.: (1) that a will made in exercise of a power of appointment is not revoked by a subsequent marriage where the property appointed would not, in default of appointment, pass to any of the persons specified in the bracketed part of s. 18 of the Wills Act 1837 (R.S.O., c. 12, s. 21 (1) (c)); (2) that the postponement of the period of vesting until the appointee was 25 did not offend against the law of perpetuities.

LANDLORD AND TENANT—PROVISION AGAINST ASSIGNMENT WITHOUT LICENCE—LICENCE NOT TO BE UNREASONABLY WITHHELD—REFUSAL BECAUSE LESSOR WANTED POSSESSION.

In re Winfrey and Chatterton (1921), 2 Ch. 7. In this case Sargant, J., holds that where a lessor has agreed not to unreasonably withhold his consent to an assignment by the lessee, he is violating the agreement if he refuse to consent to an assignment merely because he wishes to get possession of the demised, and that a refusal on that ground entitled the lessee to assign without licence.

WILL—EXECUTION OF WILL IN CHILEAN FORM—"CLOSED WILL"—SEALED ENVELOPE—SIGNATURE AND ATTESTATION ON COVER—SIGNED BUT UNATTESTED WILL INSIDE ENVELOPE—VALIDITY—REALTY IN ENGLAND—WILLS ACT 1837 (1 VICT. C. 26)—R.S.O. c. 126.

In re Nichols; Hunter v. *Nichols* (1921), 2 Ch. 11. In this case the validity of a will in Chilean form to pass realty in England was in question. The testator was an Englishman domiciled in Chile and he executed a closed or secret will accord-

ing to the provisions of Chilean law, before a notary public and five witnesses. By that law "a closed will" was deemed to include the cover which contained it, and that cover was the only document on which the names of the testator, the notary and the five witnesses were signed together—the will itself being signed by the testator alone. The closed will and cover was proved in Chile and letters of administration with the will and cover annexed were granted in England. Eve, J., who heard the application, held, following the reasoning in *In re Alenomius* (1859), 20 L.J. (P.) 46, that the indorsement on the envelope and the document therein enclosed constituted one testamentary document and it was sufficient to pass real estate in England.

WILL—CONSTRUCTION—DEVISE OF REAL ESTATE AND BEQUEST OF PERSONALTY—TESTATOR POSSESSING LONG TERM LEASEHOLDS BUT NO REAL ESTATE STRICTLY SO CALLED—EFFECT OF DEVISE ON LEASEHOLDS—WILLS ACT 1837 (1 VICT. 26), S. 26—(R.S.O. c. 120, s. 29).

In re Holt; Holt v. *Holt* (1921), 2 Ch. 17. In this case a devise of real estate was held by Sargant, J., to pass leaseholds in the following circumstances. A testator who had no real estate strictly so called was possessed of two long term leaseholds, and, by his will, he gave all his "personal property" to some persons, and "all his real estate and property" to other persons, and the question therefore arose whether the gift of his real property would pass the leaseholds. The learned Judge, although holding that s. 26 of the Wills Act (R.S.O. c. 120, s. 29) did not apply, nevertheless held that, apart from the Act, the case was governed by *Rose* v. *Bartlett,* Cro. Car. 292, which he considered was still law, and that the leaseholds passed.

LANDLORD AND TENANT—PAROL LEASE WITH OPTION TO PURCHASE—POSSESSION TAKEN—OPTION EXERCISED IN WRITING—PART PERFORMANCE—STATUTE OF FRAUDS—SPECIFIC PERFORMANCE.

Brough v. *Netleton* (1921), 2 Ch. 25. The plaintiff in this case made a verbal agreement with the defendant for the lease

of certain premises with an option to purchase the same. In pursuance of the agreement he entered into possession and subsequently in writing exercised the option. The defendant having refused to carry out the sale the action was brought for specific performance, and the defendant set up the Statute of Frauds as a defence. Lawrence, J., who tried the action, held that the taking possession of the property by the plaintiff amounted to a part performance of the contract which entitled him to prove all the terms of the parol agreement, and, this being done, he gave judgment for specific performance as prayed.

TRUSTEE—INTESTATE'S ESTATE CLEARED OF DEBTS AND ADMINISTRATION — POWER OF COURT TO APPOINT TRUSTEE TO ACT JOINTLY WITH ADMINISTRATRIX—TRUSTEE ACT 1893 (56-57 VICT. c. 53), s. 25 (1) (3)—R.S.O. c. 121, s. 4 (2) (4))

In re Ponder; Ponder v. *Ponder* (1921), 2 Ch. 59. In this case an application was made to Sargant, J., to appoint a trustee to act jointly with an administratrix who had cleared the estate of debt and administration expenses, and in whose hands a balance remained for distribution. The learned Judge held that the administratrix had now become in effect a trustee of the balance and that the Court had power to appoint a trustee to act with her on her own application, and he made the appointment as asked.

VENDOR AND PURCHASER—BUILDING SOCIETY—MORTGAGES OF MEMBERS—CONTRACT TO SELL MORTGAGES TO ANOTHER BUILDING SOCIETY—DIRECTORS ACTING HONESTLY—ULTRA VIRES—SPECIFIC PERFORMANCE.

Sun Permanent Benefit Building Society v. *Western Suburban H.R. Building Society* (1921). 2 Ch. 83. This was an action to enforce the specific performance of a contract whereby the defendant society agreed to buy certain mortgages of members of the plaintiff society. The directors of the defendant society had acted honestly in entering into the contract, but claimed that in the event of the transaction proving unprofitable they might be held to have acted *ultra vires*; and that the contract was made

under the erroneous impression that the mortgagors would become members of the defendant society and as such liable to pay fines in accordance with the rules in case of default. Lawrence, J., who tried the action, held that the contract was not *ultra vires* of the defendant society, and though conceding that the Court would not decree specific performance involving a breach of trust, yet he found that the contract had been fairly entered into even if there had been some breach of duty by the directors of which the plaintiffs had no notice, and though the defendant might not be able to impose fines on the mortgagors that was no ground for refusing specific performance.

NEGLIGENCE—NUISANCE—COAL MINE—COLLIERY SPOIL—TIPPING ON MOUNTAIN SIDE—LANDSLIDE OCCASIONED BY TIPPING—LICENCE TO CARRY ON TRADE.

Attorney-General v. *Cory, and Kennard* v. *Cory* (1921), 1 A.C. 521. This was an appeal by the plaintiffs in two separate actions against the same defendants. The defendants carried on a coal mine and by leave of the plaintiffs in the second action had tipped spoil from the colliery on their land which was a mountain side. The result was that a landslide took place and injured certain houses of the licensors and also a public road. The first action was brought by the Attorney-General on the relation of the municipality in which the road was vested, to restrain the nuisance and for damages done to the road. The other action was brought by the licensors claiming damages and an injuction on the ground that the defendants had tipped to an unreasonable extent and in an unreasonable manner. The House of Lords (Lords Haldane, Finlay, Atkinson, Shaw and Buckmaster) gave judgment (Lord Buckmaster dissenting) finding on the evidence that the landslide was due to the defendants having neglected to drain the tips, and that they were liable to both plaintiffs for the damage done both on the principle of *Rylands* v. *Fletcher* (1866), L.R. 1 Ex 265, and also on the ground of negligence, and the judgment of the Court of Appeal to the contrary was reversed. Lord Finlay was of the opinion that apart from negligence the defendants would not have been liable to the plaintiffs in the second action either on the principle of *Rylands* v. *Fletcher* or on the principle that a licence to carry

of a trade does not authorize the licensee to create a nuisance, unless that is the inevitable result of carrying on the trade.

SHIP—ADMIRALTY—COLLISION—SHIP NOT UNDER COMMAND—CROSSING COURSES—REGULATIONS FOR PREVENTING COLLISIONS AT SEA 1897, ARTS. 4, 19, 21—CONCURRENT FINDING OF FACT BY COURTS BELOW.

S.S. Mendip Range v. *Radcliffe* (1921), 1 A.C. 556. This was an action brought by the owners of the S.S. Mendip Range against the commander of the Drake, a British cruiser, to recover damages for collision owing to alleged negligent navigation and breach of the Regulations for Preventing Collisions at Sea 1897, arts. 4, 19, 21. The Judge at the trial and the Court of Appeal found in effect that the Drake, having been torpedoed, was "not under command," and that the defendant was justified in hoisting the "not under command" signal, and that he had not been guilty of negligence, and the House of Lords (Lords Haldane, Finlay, and Atkinson—Lords Wrenbury and Phillimore dissenting) held that there having been this concurrent finding of facts by the Courts below their decisions ought not to be disturbed, and the appeal consequently failed.

WILL — CONSTRUCTION — BEQUEST BY BARONET'S SON TO HIS BROTHERS FOR LIFE AND THEN TO THE HEIR TO THE BARONETCY —TIME FOR ASCERTAINING HEIR.

Lucas-Tooth v. *Lucas-Tooth* (1921), 1 A.C. 594. In this case the construction of a will was involved which resulted in some difference of judicial opinion. Sir Robert Lucas-Tooth, Bart., had three sons — Selwyn, Douglas and Archibald. The son Douglas made the will in question in 1914, whereby he bequeathed certain stocks to his brothers Selwyn and Archibald in equal shares for their lifetime only, and then to pass to the heir of the baronetcy—then held by his father—and failing an heir to the eldest daughter of Selwyn. The testator died in 1914. Selwyn also died subsequently in 1914 leaving a daughter but no son. Sir Robert, the father, died in 1915, and the

baronetcy then passed to Archibald, who died in 1918; and on his death the baronetcy became extinct for want of an heir. The question therefore rose whether the daughter of Selwyn was entitled to the capital of the fund, or whether it had become vested in Archibald as the heir of the baronetcy within the meaning of the will, and this depended on whether such heir was to be ascertained at the date of the death of Sir Robert or at the death of the survivor of the testator's two brothers. The Courts below had taken the former view, but the House of Lords (Lord Birkenhead, L.-C., and Lords Finlay, Dunedin, and Shaw —Lord Atkinson dissenting) reversed their decision and came to the conclusion that the heir of the baronetcy must be ascertained at the last of the last survivor of the two brothers of the testator, and that there being then no heir the gift over in favour of Selwyn's daughter took effect.

LUNACY—PAUPER—SUMMARY RECEPTION ORDER BY CHAIRMAN OF BOARD OF GUARDIANS—CERTIFICATE OF MEDICAL PRACTITIONER —ACTION FOR GIVING FALSE CERTIFICATE—NEGLIGENCE.

Everett v. *Griffiths* (1921), 1 A.C. 631. This was an appeal to the House of Lords (Lords Haldane, Cave, Finlay, Atkinson, and Moulton) from the decision of the Court of Appeal (1920), 3 K.B. 163 (noted ante vol. 57, p. 107), and is noteworthy as an instance of the careful and thorough way their Lordships deal with cases involving questions of personal liberty. The action was instituted by a pauper against the chairman of a board of guardians and a medical practitioner to recover damages for (as alleged) wrongfully committing him to a lunatic asylum, the certificate of the medical man being claimed to have been false, and the chairman being alleged to have been negligent in acting upon it. The Lord Chief Justice, who tried the action, directed judgment to be entered in favour of both defendants on the ground that the chairman was acting judicially and therefore was not liable to an action; and as against the medical man because the plaintiff's detention was not caused by the certificate, but by the order signed by the chairman. On a motion for a new trial this judgment was affirmed by the Court of Appeal (Atkin, L.J., dissenting), but on different grounds. After an elaborate discussion of the matter in judgments covering over

50 pages of the reports, their Lordships unanimously dismissed the appeal, as against the chairman on the ground that he was honestly satisfied that the plaintiff was insane, and that no action for negligence lay against him; and as against the medical man on the ground that there was no evidence fit to be left to a jury of any want of care on his part.

PRACTICE—SERVICE OUT OF JURISDICTION—CONTRACT TO BE PERFORMED WITHIN THE JURISDICTION—SALE OF SHIPS TO BE DELIVERED WITHIN JURISDICTION — REFUSAL TO TAKE DELIVERY—(ONT. RULE 25 (1) (e)).

Hemelryck v. *William Lyall Shipbuilding Co.* (1921), 1 A.C. 698. This was an appeal from the Suprme Court of British Columbia affirming an order of Hunter, C.J., allowing service of a writ of summons out of the jurisdiction in the following circumstances. The defendant had entered into a contract to buy six ships to be delivered in British Columbia but to be paid for in New York. The defendants refused to accept delivery. The Judicial Committee of the Privy Council (Lords Buckmaster, Dunedin and Shaw) dismissed the appeal, being of the opinion that for the purpose of satisfying the Rule of Court it is sufficient if there is one term to be performed within the jurisdiction, but that principle could not be invoked by setting up an artificial cause of action in order to provide jurisdiction as was attempted in *Johnston* v. *Taylor* (1920), A.C. 144, noted ante vol. 56, p. 153.

CANADA—QUEBEC—MARRIAGE—IMPEDIMENT TO MARRIAGE—PROHIBITED DEGREES—RULE OF ROMAN CATHOLIC CHURCH AS TO PROHIBITED DEGREES—IMPEDIMENT NOT SPECIFIED IN CIVIL CODE—CIVIL CODE OF QUEBEC, ART. 127—32 HEN. VIII., C. 38.

Despatie v. *Tremblay* (1921), 1 A.C. 702. This was an appeal from the Superior Court of Quebec which had affirmed a judgment annulling a marriage between two Roman Catholics duly solemnized according to the rites of the Roman Catholic Church, on the ground that the parties were cousins of the fourth degree according to the mode of reckoning of the R.C. Church. The

parties were married in 1904, and lived together thereafter as man and wife until the year 1910, when the husband made application to the Roman Catholic bishop of the Diocese to have the marriage declared null and void on the ground of his relationship to his wife as a cousin of the fourth degree, of which fact neither he, nor his wife, had any knowledge at the time of the marriage, but which it was claimed was an impediment to the marriage unless a dispensation should be first obtained, which of course, in the circumstances, could not even be thought of—as neither party knew of the existence of the impediment. The bishop granted the application, and pronounced the marriage null and void and, as far as he could do so, annulled it. The husband then applied to a civil Court for judgment of nullity, and that Court, conceiving itself bound by the judgment of the bishop as to the invalidity of the marriage, gave judgment of nullity as prayed, and this judgment was affirmed by the Superior Court (Archibald, J., dissenting); and it was from that judgment the present appeal was brought. The case practically turned on the proper construction of Art. 127 of the Civil Code of Quebec. The Provincial Courts came to the conclusion that it had the effect of making all the prohibited degrees of the R.C. Church part of the civil law of Quebec. The Judicial Committee of the Privy Council (Lord Birkenhead, L.-C., and Lords Haldane, Cave, Dunedin, and Moulton) in a very convincing judgment, delivered by the late Lord Moulton, makes is quite clear that art. 127 had no such effect, and that the only legal prohibitions to marriage in Quebec are the Levitical degrees referred to in 32 Hen. VIII., c. 38, and that the only effect of art. 127 is to afford the ministers of any religious organization having according to its rules prohibited marriage within degrees other than the Levitical degrees, a justification for refusing to solemnize any marriage offending against such special rules, and also a justification to the religious organization whose rules are violated by its members for disciplining such offenders. We also observe from what is said in this judgment that the notion, which apparently gained some credence in Quebec, that a marriage of a Roman Catholic could not be validly solemnized except in accordance with the rules laid down by the Council of Trent has, as a matter of law, no legal foundation, although no doubt Roman Catholics whose marriage are solemnized otherwise than in accordance with those rules may subject themselves to be disciplined by the church of which they are members.

Bench and Bar

Lord Chief Justice of England.

When Lord Reading went as Viceroy to India his place was filled by Mr. Justice A. T. Lawrence. The latter, subsequently created Lord Trevithin, has now resigned, and is succeeded by Sir Gordon Hewart, Attorney-General, whose rise is said to be meteoric but well deserved. He is succeeded in the office of Attorney-General by Sir Ernest Pollock, Solicitor-General.

Meetings of Bar Associations.

We are informed that Lord Shaw of Dunfermline, so well and favourably known to the profession in England and Scotland, will this year be the guest of the two great Bar Associations of this continent, Canada and United States, both of which meet in August next. His presence will greatly add to the interest of these meetings. We are much indebted to the thoughtful care and happy discrimination of Sir James Aikins and Mr. C. A. Severance in giving their respective Associations this treat. It is an education to have with us from time to time leaders in thought and expression from the mother land.

Ontario Bar Association—Annual Meeting.

The sixteenth annual meeting of the Association, held at Osgoode Hall on the 15th and 16th March, 1922, was one of unusual interest. The subject of Legal Education was the predominating theme. As the subjects discussed were of much wider interest than the limits of the Province of Ontario, we give a fuller report than usual.

The honorary president, Hon. Mr. Justice Riddell, lent his very active support to the success of the occasion and presided at most of the sessions. After a word of welcome to the guests of the Association and its members, he spoke substantially as follows:—

"TThere never has been a time for generations in which there was not interest for the lawyer; but to-day we are living in an era which ought to be, and is, more interesting to the lawyer than any of the many glorious centuries which have preceded it. . . . I do not mean the lawyer who looks upon law as his bread and butter, the lawyer who sees nothing in law except money; I mean the lawyer who recognises that law is the voice of

eternal justice, and that law is the foundation upon which all civilization must necessarily be built. . . . The time has long gone by when the ruling principle was,

'The good old rule, the simple plan,
That they should take who have the power,
And they should keep who can.'

. . . It may be that the profesion of law at large is losing its interest in public affairs of this country and devoting its attention rather more closely to business. That is to be deplored. . . . The lawyer ought to be a business man and make as much money as he honestly can, but I venture to think it is not right for prominent leading lawyers to disregard the public affairs of the country, to omit to take the great part in the affairs of the country which was taken by the great lawyers of the past."

This was followed by the annual address of the president, Mr. R. J. Maclennan, K.C. As the ful text of this able address will ultimately reach every member of the Association, we only refer to it briefly. He pointed out that the subject of Legal Education is now undergoing lively discussion on both sides of the Atlantic. In England no general address to lawyers seems complete without some reference to Legal Education. Both English and American lawyers agree that a considerable amount of knowledge should be acquired *before* a student enters the law school. The present standard in Manitoba is two years of University work and the American Bar Association at the present time is seeking to set up a similar standard. Dr Josef Redlich of the faculty of law and political science in the University of Vienna was brought to the United States before the war to examine methods of study in law schools. His report, entitled "The Common Law and the Case Method," was issued in 1914. The next bulletin, of about 300 pages, called "Justice and the Poor," prepared by Reginald Heber Smith of the Boston Bar, was published in July, 1919; and perhaps the most valuable, entitled "Training for the Public Profession of the Law," a book of over 500 pages, the work of Mr. Alfred Z. Reed, was published in June, 1921. Reference was also made to the conference on Legal Education held at Washington on February 23, 24, 1922, at which more than one hundred and fifty law Associations were represented, including delegates from Bar Assocations in Canada. After much discussion and difference

of opinion the recommendations of the American Bar Association received the almost unanimous approval of the meeting. These recommendations included the following: 1. That a law student should, before admission, have two years of study in a college. 2. That the law course should be at least three years of a student's whole time. 3. That there should be an adequte school library and most of the teachers should give their entire time to the school to ensure personal acquaintance and influence with the student body. 4. That the student's fitness to practice should be passed upon by some public authority, and that a list of all Law Schools in the United States should be prepared and divided into those which give a standard equal to the above and those which do not, so that intending students might know what school to choose.

Speaking of recommendation number 4, the President proceeded, "It is a matter of great regret that the Legislature from year to year opens the door and sends into the profession, and against the judgment of the Benchers, men who seek to escape the full rigor of the curriculum. We must never forget the truth of the maxim 'there is no royal road to learning' and that it applies to legal education."

The three principal addresses on the subject of Legal Education, in addition to the President's, were delivered by Dean Harlan F. Stone, of Columbia Law School; Dean MacRae, of Dalhousie Law School, and Dean McKay, of McGill University. All these gentlemen supported in the main the ideals of the American Bar Association, as to the standard requirements for entrance to the law school, and, in addition to this, favored what is called the "Case Method" of study as distinct from the lecture, or, as many of the speakers put it, "the case method as meaning directing the student to the sources." These addresses, it is hoped, will be published in full at a not too distant date for the benefit of all who are interested in the Association. An attempt to give their bare substance here would be futile. They were all of a first class order and it was a matter of regret, as it always has been, that so few of the members of the profession interested themselves sufficiently to go and hear them. The profession in the Province numbers two thousand or upwards and at some of the meetings, at which the most important addresses were being delivered, the attendance numbered not more than fifty to one hundred persons, notwithstanding the wide

publicity given to the same in advance. If any member of the Association or profession could suggest an effective method of rousing the members of the legal flock in the Province to a sense of their opportunity, his suggestion would be welcomed as a very valuable one by those who seek to promote the highest aims of the profession, for it is only by association and some approach to unity that these things can be accomplished.

Mr. Roger Sherman, of the Illinois State Bar, delivered an instructive address on a subject not by any means unrelated to the same subject, namely, on "Business Systems in Law Offices." He would abolish the old time roll top desk and all the accumulation which seems to belong to it, and to introduce such ideas of efficiency he would carry into the administration of the lawyer's practice the adoption of modern filing systems and of methods of discipline most conducive to the efficient management of the office, which, he said, should be managed as a business; and that these ideals, far from being in conflict with the highest ethics of the bar are, on the contrary, in accordance with them and are a challenge to the lawyer who would teach and lead and give the maximum service with the maximum satisfaction to himself and his clients. Mr. Sherman's address contained many useful and practical ideas which were greatly appreciated by his audience, and on motion he was unanimously elected as an honorary member of the Association.

The reports of the various committees which were presented contained valuable recommendations which were referred to Council for action, and as to which more anon.

A very pleasant feature of the meeting was the fact that it also commemorated the centenary of the incorporation of the Law Society of Upper Canada, and the afternoon session was devoted exclusively to this feature. It was in charge of the Benchers of the Law Society, Mr. E. Douglas Armour, K.C., being chairman in the absence of the Treasurer, Hon. Featherston Osler, K.C., through illness. On the platform were seated also Chief Justice Sir William Meredith, Hon. Mr. Justice Anglin, Hon. Mr. Justice Riddell, Hon. Mr. Justice Masten, and others.

A brief address was delivered by Hon. Chief Justice Sir William Meredith, who received a very hearty welcome. The learned Chief Justice and the chairman, Mr. Armour, held and advocated different views on the much mooted question of the

affiliation of the Law School with the Toronto University. The Chief Justice sponsored the idea as a very desirable and practical one, while the Chairman was equally strong in his expression of the opinion that for the Benchers to become party to such an arrangement would be tantamount to giving up a trust that had been reposed in them for more than one hundred years. No vote was taken.

Mr. Justice Anglin gave a very instructive address, in which, by way of reminiscence, he singled out the late Mr. Christopher Robinson, K.C., as perhaps the most outstanding man at the Bar of Canada during his lifetime.

At this meeting the Hon. Mr. Justice Riddell delivered an address on the history of the Law Society of Upper Canada prior to its incorporation in 1822. He traced the growth of the Society from the year 1797 until the incorporation of the present Law Society of Upper Canada in 1822. Again space forbids our doing justice to this most instructive and painstaking address, a veritable mine of information. This, too, it is hoped, may be published in full hereafter.

The annual banquet was held at Hart House, Toronto University, Hon. Mr. Justice Riddell presiding. Many pleasing and entertaining speeches were made by some of the guests, including the Lieutenant-Govrnor of Ontario, Dean MacRae, Dean McKay, Hon. Mr. Justice Anglin of the Supreme Court, Mr. MacDougall, C.R. of Montreal, President Falconer of Toronto University, and Mr. Buck of the Buffalo Bar. Mr. E. Douglas Armour, K.C., was called upon to recite "The Student's Dream," which he did in his own inimitable fashion to the delight of those present. Dean MacRae and Mr. Justice Anglin furnished an improptu drama in the somewhat divergent notes they struck on the subject of appeals to the Privy Council. The former thought the time was not ripe for this country to take the step of abolishing such appeals, whilst the latter was of the opinion that, if the judiciary of Canada was not of sufficient strength to constitute a Court of final resort it ought to be, and that the remedy lay, not in continuing appeals to the Privy Council, but in looking forward to the time when the Judges of our final appellate court would take rank with those of the Judicial Committee of the Privy Council.

The officers and members of Council for the ensuing year are as follows:—Hon. Mr. Justice Hodgins, honorary president;

Francis Ping, K.C., Kingston, president; Francis Kerr, K.C., Peterboro, vice-president; A. J. Russell Snow, K.C., Toronto, vice-president; Nicol Jeffrey, K.C., Guelph, vice-president; A. A. Macdonald, Toronto, recording secretary; W. H. Murphy, Toronto, corresponding secretary; H. F. Parkinson, Toronto, treasurer; W. S. Herrington, K.C., Napanee, historian and archivist.

Toronto members—J. H. Spence, K.C.; Daniel Urquhart, K.C.; H. S. White, K.C.; T. A. Rowan, W. D. Gregory, Daniel O'Connell, K.C.; J. M. Clark, K.C.; E. Percival Brown, K.C.; W.J. Elliott, K.C.; T. H. Barton, Judge Denton.

Other members—W. S. Ormiston, Uxbridge; K. F. Kerr, K.C., Cobourg; O. L. Lewis, K.C., Chatham; W. N. Ponton, K.C., Belleville; J. S. Davis, Smithville; W. T. Henderson, K.C., Brantford; V. A. Sinclair, K.C., Tilsonburg; W. S. MacBrayne, K.C., Hamilton; J. B. McKillop, K.C., London; Harold Fisher, K.C., Ottawa.

APPOINTMENTS.

Severin Letourneau, of the City of Montreal, K.C., to be a Puisne Judge of the Court of King's Bench for the Province of Quebec. (Jan. 25)

Duncan Campbell Ross, of the Town of Strathroy, Ont., Barrister, to be Judge of the County Court of the County of Elgin, Ont. (Jan. 25)

J. St. George Stubbs, of Birtle, Manitoba, to be Judge of the County Court for the Northern Division of the Eastern Judicial District of that Province. (March 23)

Daniel O'Connell, of the City of Toronto, K.C., to be a Junior Judge of the County Court of the County of York. (April 1)

George W. Ballard, of the City of Hamilton, Ont., to be Crown Attorney and Clerk of the Peace for the County of Wentworth, Ont.

Donald W. MacLean, of the City of Ottawa, to be Registrar of Deeds for the County of Carleton, Ont. (March 18)

William S. Hall, of Van-Klesk Hill, Barrister-at-law, to be CountiesCrown Attorney and Clerk of the Peace for the United

Counties of Prescott and Russell in the Province of Ontario. (April 8)

OBITUARY.

We regret to record the death on April 2, at the comparatively early age of 52, of the Hon. Mr. Justice T. L. Metcalfe, of the Court of King's Bench, Manitoba. He was an able, painstaking and learned Judge, highly respected by all. It is said that his health was impaired by his arduous duties in connection with the strikes at Winnipeg in 1920.

Flotsam and Jetsam

We have on the list of our exchanges one that hails from south of the lakes. We enjoy it and wish it success in these days of difficulty and drought for legal journals. But we are concerned for its future in that it has lapsed from the language of its forefathers, and we are filled with dismay as to what we may expect as to its future.

The heading of a contribution to our namesake is: "Are the lawyers properly functioning as officers?"

Memory here brings before us visions of "Beef Eaters" in glorious apparel, "Beadles" in blue coats and brass buttons, "Cops" in helmets, "Tipstaves" and such like. But it sounds ponderous and incongruous, not to say comical, in a country where our professional brethren always appear in Court in every-day costume; sometimes even, as we have seen in "the Wild and Wooly West," in the dog days, in their shirt sleeves (we forgive them)!

We venture to thin that perhaps lawyers could more "properly function as officers" if they were to return to the practice of wearing white ties and horse hair wigs.

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THE QUORUM OF THE COURT IN BANCO.

By Hon. Mr. Justice Russell.

The remarks that follow will have reference to the Province of Nova Scotia. How far they are applicable to other jurisdictions the writer will not presume to say. Furthermore, they are offered in no dogmatic spirit. It may be that they present only a one-sided view of the question discussed and that when, if ever, the other side is presented the author may be obliged to change his opinion.

The rule made under the authority of the Judicature Act provides that four judges shall constitute a quorum to decide all matters requiring to be heard by the court *in banco*, but if the attendance of four judges at any time cannot be obtained, owing to absence illness or other cause, sufficient in the estimation of the judges present, three shall constitute a quorum. (Order LVIII. Rule 7).

Until quite recently this rule has governed the judges of the Supreme Court. On rare occasions it has happened that five judges have been present, and once, within the recollection of the present writer, an extra chair has been brought in and six judges have attended. It has never been considered that the rule was violated by the attendance of a greater number than four, but there are good reasons why the Court *in banco* should consist of an even number of judges.

Let us consider first the case of a plaintiff appealing from the decision of the trial judge. The defendant has succeeded in the court below. There are five judges sitting on the appeal, two of them agree with the trial judge. Three of them decide for the plaintiff. That decision for the plaintiff is final so far as the Nova Scotia Court is concerned. If no appeal lies, the plaintiff is finally successful. He has beaten the defendant, although he had no more judges supporting his views than the defendant had. The burden should be upon the plaintiff, and

yet the plaintiff is allowed to succeed in spite of the fact that the defendant had as many judges in his favour as the plaintiff had. If the case is appealable the burden of instituting the appeal is thrown upon the defendant, which again is an injustice to him inasmuch as the plaintiff, who had only three judges in his favour while the defendant had the same number, should be obliged to handle the labouring oar.

It is urged that if there are only four judges sitting on the appeal the court may be equally divided and the result will be that the decision of the trial judge will be affirmed. Just so, and that is exactly what ought to happen in such a case. The plaintiff who has failed to convince the trial judge should not succeeed on his appeal unless he can convince the majority of an even numbered court that the decision of the trial judge was erroneous.

Now let us suppose it is the defendant who appeals to the court of five judges. The plaintiff has succeeded in the court below. The defendant in order to reverse his judgment must secure three of the judges of the appeal court. It is not claimed that there is any injustice here. Each party has convinced the same number of judges, and the defendant has rightly succeeded. The presence of the fifth judge has not resulted in any injustice. Suppose there are only four judges present. The defendant appeals. He must secure the judgment of three of the four, and that is just what ought to happen in order to his success. Two of the judges who have heard the case support the plaintiff's claim and three support the defendant, who is thus ultimately successful. Again it is urged that the court may be equally divided. If so the defendant will fail on his appeal, and so he should. Three of the judges who have have heard the case have, under those conditions, supported the plaintiff's claim and only two have supported the defendant. It it right that the plaintiff should succeed and the defendant should lose.

The result is that in the case of a defendant appealing no injustice can be done by a quorum of five judges and that full justice can also be done by a court composed of the statutory quorum of four. But in the case of a plaintiff appealing the

defendant may suffer a substantial injustice by departure from the rule and the disregard of its manifest intention.

The recent departure from the practice followed in former years is due to a wholly unjustifiable sensitiveness to shallow and baseless criticism. The writer can recall conditions when a dominant personality on the Bench could carry with him the convictions of enough of his associates to make an equal division of the court a very rare occurrence. There was greater unanimity, but the greater unanimity may have connoted greater injustice. Cases were parcelled out among the judges, one assigned to one and another to another. These were the conditions of a former century. They were the conditions of a date so far distant in the past that they can be referred to with an inoffensive freedom. There was not frequently a dissenting judge. The late Chief Justice Weatherbe, when delivering one of his earliest dissenting opinions, jocosely called attention to the fact that he had been appointed to succeed ex-judge Lewis Morris Wilkins, who, as he did not say but as his hearers well knew, was the "dissenting judge" of the court of which he was a member. If among the judges at present composing the court there is less unanimity than in former days, it is because the suitor gets the benefit of the greater independence of the members of the court and their greater individual energy and research. So far from its being a reproach to a court that its conclusions are not unanimous, it should be taken as *prima facie* evidence of a more careful and thorough individual application and industry than where the conclusions arrived at by one are unanimously acquisced in by the rest.

One of the strongest objections to the insistence upon a quorum of five judges has not yet been dealt with. It is frequently the case that not more than six judges are available for work. One or more may be "indisposed" or even seriously ill. One may have been granted leave of absence for the enjoyment of a well-earned sabbatic year. A vacancy may have occurred which the government of the day cannot conveniently fill. This is a condition of things which has occurred under every government of Canada so far back as my memory carries. It is one that reflects no discredit on any government or on either or any party.

The available number of judges capable of actual work has so frequently been reduced to six, and even a smaller number, that it has for years past under all governments become the rule rather than the exception that we have only six working judges available, and the number has frequently been reduced below this standard. One of these six is detailed for Admiralty cases or Divorce cases, or Chambers work, including the trial without a jury of causes that ought to be heard and which cannot, without injustice and suffering to one or other of the suitors, await the regular sessions of the court in April or October. The consequence of this is that, unless the Chambers judge will consent to form a member of the quorum, the five remaining judges must attend day in and day out the three terms from November to March.

There is no time afforded to any one of them to study the cases argued and give them close and mature consideration, until the term is ended. Factums accumulate until the impressions gained from the argument lose their freshness. The outlines become less distinct. Contentions hastily and imperfectly noted are imperfectly or inaccurately recalled. The labor of revivi-impression is less perfect than that created by the argument. With the statutory quorum of four, under normal conditions, the judge who has heard an argument will always have an opporuntity to consider its merits soon after it has been presented and before the facts of the case have been forgotten or the lines of the argument have become blurred. One of the manuscript books of the late Chief Justice Sir William Young has come by some lucky accident into the hands of the writer. It contains a carefully prepared programme for the December term 1878. It is assumed that the court will sit fifty four days, which are equivalent to nine periods of six days each. The programme then proceeds to divide the work among the six judges of the court in such manner as to provide a quorum of four judges for every day of the anticipated nine weeks of the term.

This quorum has been considered satisfactory ever since by every succeeding Chief Justice and I have never known it to be criticised or objected to until the recent innovation was adopted.

There must be two sides to every question I suppose, but for the reasons given I submit that it will be a happy day for the judges of the Supreme Court, when we shall be able to say in the words of James Russell Lowell:

"We sail by stars the elder seamen knew."

POWERS OF OFFICIAL GUARDIAN ON SETTLEMENT OF ACTION BY INFANTS.

Frequently in these days of motor car accidents one is obliged to attend before a Judge, with counsel for the Official Guardian, and for other parties, to obtain the approval of the Court in respect to a proposed settlement of an action for damages, in which an infant is the Plaintiff. This modern example of the exercise of an ancient power of the Court sometimes presents features which seem somewhat inconsistent. The Judge, if he is not to give a merely blind approval, must inquire into the propriety of the settlement. The infant may have suffered severe injuries, but inquiry into the evidence may shew that he is unlikely to succeed at the trial. No one can intelligently approve or disapprove of a proposed settlement without going into the merits of the action. If the Judge should believe it to the infant's advantage to accept a proposed settlement because he would not succeed at a trial, what is his duty?

The power of the Court to intervene to safeguard the rights of infants of its own volition is not based on guardianship nor on wardship. By 12 Chas. 11 Cap. 24, the powers of the Court of Wards and Liveries were abolished. While the parent is alive the Court is not the infant's guardian. The true basis of the Court's jurisdiction in this respect is pointed out in Butler v. Freeman Amb. 301. In this case, where it was held to be comtempt to marry a ward of the Court without leave even although the father of the infant be living, Lord Hardwicke, Chan. says: "This is the first offence which has come before me since the late statute. The Plaintiff's father is alive and nobody can have the guardianship of him by reason of the patris potentia, consequently this Court has not; and so this Court cannot interfere. But this Court does not act on the foot of guardianship or wardship; the latter is totally taken away by the statute

Car. II, and without claiming the former, and disclaiming the latter, has a general right, delegated by the Crown as pater patriae, to interfere in particular cases, for the benefit of such who are incapable to protect themselves."

The inability of infants to protect themselves cannot be set up in our Ontario Courts, where they are represented by the Official Guardian.

It is not hard to imagine a case where the solicitor, who has issued the Writ on behalf of the infant by its next friend, may be very anxious to accept a sum which may appear very inadequate in comparison with the injuries sustained by the infant, because he may have discovered evidence which renders his chances of success at the trial very remote. Under such circumstances, the Official Guardian may approve of the settlement. Counsel appear before a Judge to obtain the approval of the Court, and find the Court unwilling to approve, because of the meagerness of the amount offered. But if the Court forces disclosure of the facts it may find that the infant is entitled to nothing, on the evidence. The Court's intervention on behalf of the infant may prove detrimental to the infant.

The exercise of this ancient power of the Court seems to force the Judge into the position of advocate for the infant. In a recent case the Court was dubious as to whether the proposed settlement was adequate. Counsel for the Plaintiff could not very well say in the presence of his opponents that he would be glad to get anything at all after perusing the evidence.

When there is an officer of the Court appointed to protect the interests of all infants, would it not be well to allow him to decide finally whether or not a proposed settlement is adequate without further proceedings.

JUDGES AND POLITICS.

These two words do not seem to go well together and that which is indicated by them should, as a rule, be kept in separate compartments, and only be used together on special occasions.

Much adverse criticism was recently raised by the action of Lord Justice Carson in taking part in a debate in the House of Lords on the Irish situation. Few would deny him

that privilege under the circumstances and in view of his loyalty to the Crown in the distressful days that have passed since the Great War began. But from a theoretical point of view there is as usual, much to be said on both sides as to the wisdom or propriety of judges appearing in the political arena. And much more has been said on such occasions by those who have held judicial positions as well as by those who have criticised them for taking part in such discussions.

These criticisms in dealing with the historical setting of the subject have been compelled to admit that in England there has been a much wider latitude taken by and allowed to judges sitting in the House of Lords than has been generally supposed. Such great judges as Lord Hardwicke, Lord Mansfield, Lord Thurlow, and Lord Eldon exercised a powerful influence in the field of politics in their days. In later years Lord Cairns, who in Feb., 1866, became the second Chancery Lord Justice, early the next year was sitting as a Peer in the House of Lords; and as such is said to have made twenty-four speeches on the Reform Bill when that measure came before the Upper House. A long list might be given of other distinguished members of the Bench who, when they became Peers of the realm, expressed their views in the House of Lords on public questions with the same freedom as those who had no judicial duties to perform.

One of our Exchanges calls attention to the fact that so clear a thinker and eminent a writer as Lord Macaulay was not horrified at the idea of the "combining of a political and a judicial calling." He said that, far from wishing to cut off judges from political life, he would like to see them in the House of Commons in greater numbers. He would, he said, throw open the door to all the judges. It is noteworthy that the House of Commons agreed with his views by the large majority of 224 to 123.

We are not, however, prepared to accept the proposition that what may be done with propriety in old England can safely and wisely be done in the outlying units of our Empire. We have often seen in this Dominion unseemly clashes and unedifying spectacles resulting from the "combining of political and judicial callings." We do not desire to enlarge upon the

reasons underlying the differences; but they will readily occur to any thinking mind. Some of them are akin to those which account for our unwillingness to accede to the desire of those who would seek to deprive us of our right of appeal to the foot of the throne. The subject is an interesting one, and perhaps some of our readers would like to discuss it in their own way.

THE RELATIONS BETWEEN THE BRITISH DOMINION OF VIRGINIA AND THE DOMINION OF CANADA.

This subject was first referred to in a paper read by Dr. J. Murray Clark, K.C., of Toronto, at Harvard University in 1919, under the title "Whence came the Common law into Canada." Our reference to it appears in 56 C.L.J. 281. Dr. Clark deals with some aspects of the same subject in a paper read by him at Annapolis Royal, Nova Scotia, in August of last year, on the occasion of the celebration of the 200th anniversary of the establishment of the first British Court of Judicature to sit in any part of what is now Canada. As to this Mr. Clark calls attention to a remark of Mr. A. H. Lefroy (a brother Journalist of ours), Professor of Constitutional Law and Jurisprudence in the University of Toronto, in which he points out that a Court of Judicature is the symbol and indeed the embodiment of the reign of law in any country.

Want of space prevents more than a passing reference to Dr. Clark's paper, which a leader of the Virginia has characterised as "a great and scholarly address fraught with special significance to the day in which we live." Some passages, however, we extract as of special interest in this country. We quote as follows:—

"Dr. Bruce, one of the ablest of the historians of Virginia, points out how closely Virginia approached the system of the Mother Country and that not even the revolution could efface on our continent the mighty work which England had done through the growth of Virginia and the other American communities. He points out that her general principles of law and government, her standards of morality, her canons of literary taste, and her practical conservative spirit, have been too deeply

stamped upon all those communities for a political revolution to diminish their influence, and he contends that American independence has really led to the most glorious of all England's triumphs. He points out that, as a separate nationality, 'the United States has drawn a very large proportion of its citizens from the various countries situate on the European continent, and differing very radically in the character of these peoples. Transferred to America, these immigrants were destined to see their children grow up almost as deeply affected by the spirit of the fundamental institutions of England, as represented in the general framework of the American system, as if they were of the purest Anglo-Saxon stock.' His conclusion is well worth quoting: 'From this point of view, the foundation of Jamestown is the greatest of all events in the modern history of the Anglo-Saxon race and one of the greatest in the history of the world. From this point of view also the conditions prevailing in colonial Virginia—the foremost and most powerful of all the British dependencies of that day, and the one which adopted the English principles and ideas most thoroughly and was most successful in assimilating them, becomes of supreme interest; for from these conditions was to spring the characteristic spirit of one of the greatest modern nationalities; and from these conditions was to arise a permanent guarantee that, whatever might be the fate of England herself, the Anglo-Saxon conception of social order, political freedom, individual liberty, and private morality, should not perish from the face of the earth.' ''

And again:—

''The first Parliament of Upper Canada (now Ontario) which met in pursuance of the Imeprial Statute of 1791 (known as the Constitutional Act), at Newark (now Niagara), enacted that in all matters of property and civil rights resort should be had to the laws of England (as they stood on the 15th October, 1792), This must be qualified by the important exception, not expressed by the Legislature but implied by the Courts, of such English laws as are clearly not applicable to the state of things existing in the Province. The principle was well stated by Chief Justice Sir John Beverley Robinson, to whom I shall presently refer. That first Parliament also provided for appeals to His Majesty

in Council. The appeal is now to the Judicial Committee of the Privy Council, which has rendered, and will, I hope, continue to render signal service not only to Canada and the Empire but also to the whole civilized world. That august tribunal has not only to deal with the Common Law of England, brought from England to Virginia and via Virginia to Nova Scotia, but with many other systems of law, such as the Civil Law in force in Quebec, the Roman Dutch Law in parts of South Africa, and many other laws. This illustrates the genius of the British Empire, whose unity is not based on a dull and deadly uniformity, but is enriched by a most diversified variety. Those who brought to Ontario the noble traditions of British Virginia took their due part in passing this wise legislation of the Parliament of 1792, and their descendants are still influential in maintaining British traditions.

The first educationalist in the Province of Ontario, indeed at one time the only educationalist, was the Reverend Dr. John Stuart, a grandson of Governor Dinwiddie of Virginia. He had a good deal to do with the training of two Chief Justices—Chief Justice Stuart of Quebec, and Sir John Beverley Robinson, the first Chief Justice of the Ontario Court of Appeal, who referred to Dr. Stuart as his spiritual father. Professor A. H. Young, of the University of Toronto, has rendered good service by making scholarly investigations of the records of Dr. Stuart, many of whose descendants, including Sir Campbell Stuart, did splendid work in the Great War. Men of science are busy investigating the beginnings of civilization. Much more important, it seems to me, is it to study the beginnings of the history of our own country.

Sir John Beverley Robinson was the son of a Virginia lawyer. He became Attorney General when he was twenty-one, but after achieving this distinction, decided to study law in London, at Lincoln's Inn. So that it can be truly said that he brought to the administration of justice in Ontario the traditions of Virginia as well as the traditions of the English Courts. He acted as Chief Justice for 33 years. In all that time only five of his decisions were questioned by appeal to the Judicial Committee of the Privy Council, and in every case the judgment of Chief Jus-

tice Robinson was sustained. His judgments as published in our Law Reports are enduring monuments of his learning, legal acumen, and sound judgment.

What has happened to the Common Law since it was brought from England to Virginia, and via Virginia to Nova Scotia, constitutes, I think, a solid ground for sane optimism as to the future. For 'our Lady of the Common Law' now rules in all of the United States except Louisiana, and in all of Canada except Quebec.

In considering the significance of this it is well to bear in mind the statement of Savigny that 'law must be regarded as a product of the entire history of a people. It is not a thing that can be made at will or ever has been so made; it is an organic growth which comes into being by virtue of an inward necessity, and continues to develop in the same way from within by the operation of natural forces.' Part of the laws so brought to Virginia were the principles of the Great Charter, which are the common heritage of England, Canada, and the United States. To this is largely due the important, indeed unique, fact that along the three thousand miles of boundary between the United States of America and Canada there has been uninterrupted peace for over a hundred years. For a part of these hundred years all was not Canadian boundary, as a hundred years ago Canada consisted of Lower Canada, now Quebec, and Upper Canada, now Ontario; but wherever the boundary was from time to time, it was always during the whole century British boundary. As it is their common glory, the British Empire and the United States are therefore fully justified in pointing the war-weary and war-sick nations to the hundred years of peace along the whole of the three thousand miles of the Canadian boundary as an object lesson for study and imitation. Canadians understand the people of the United States better than the people of the Mother Country do, and should therefore be the interpreters of the United States to the British Empire, and for similar reasons, the interpreters of the British Empire to the United States."

He concludes as follows:—

"A Greek Scholar recently proved that most of the fallacies

now being advocated, and causing extensive mischief in Canada, England, and the United States, had been put into the mouths of demagogues by Aristophanes. The demagogues and sophists caused the destruction of the Athenian Commonwealth, but their fallacies will, in both the British Empire and the United States, be defeated by the enlightenment of public opinion. In this illumination, 'the gladsome light of Jurisprudence' will be a potent factor. When concluding his lectures to the Law Schools of the United States, Sir Frederick Pollock, her most learned Knight, nobly said:

'Remember that our Lady the Common Law is not a task-mistress, but a bountiful sovereign whose service is freedom. The destinies of the English-speaking world are bound up with her fortunes and her migrations, and its conquests are justified by her works.'

While one, as in duty bound, praises 'our Lady the Common Law,' yet I would not utter one word of criticism or disparagement of the Civil Law which is undoubtedly one of the greatest achievements of the human intellect. It must be remembered that the Civil Law rules not only in France, Scotland, and on the banks of the St. Lawrence, but elsewhere over millions, tens of millions, of men, and in all cases not by reason of imperial power, but by the imperial power of reason, if one may once again so paraphrase the famous saying of Portalis:

'Non ratione imperii, sed imperio rationis.'

Truly peace hath her victories no less renowned than War, and Napoleon's Code will be remembered, and in some places reverenced and obeyed, long after his battles are forgotten.

In the fullness of time the day came when Virginia as part of the United States, and Canada as part of the British Empire, fought under the great Frenchman, Field-Marshal Foch, in a common cause. The sons of Canada and Virginia were tested in the fiery trials of the Great War, and proved faithful and true to the highest ideals. Many of the sons of Canada and Virginia, yea, and of the sons of all parts of the British Empire and the United States and of our Allies, gladly laid down their bright young lives, 'their fairest gift of a lover's devotion,' to the sacred cause of liberty. Of them we may use the immortal words

of Pericles, spoken long years ago in praise of the fallen heroes of Athens:

'But each one, man by man, has won imperishable praise, each has gained a glorious grave—not that sepulchre of earth wherein they lie, but the living tomb of everlasting remembrance wherein their glory is enshrined, remembrance that will live on the lips, that will blossom in the deeds of their countrymen the world over. For the whole earth is the sepulchre of heroes; monuments may rise and tablets be set up to them in their own land; but on far-off shores there is an abiding memorial that no pen or chisel has traced; it is graven, not on stone or brass, but on the living heart of humanity. Take these men, then, for your ensamples. Like them, remember that prosperity can be only for the free, that freedom is the sure possession of those alone who have courage to defend it.'

Without stinting our admiration and love for noble France, we can say, indeed we must say, that the world's best hopes rest upon the solidarity and co-operation of the English-speaking Peoples. The United States and the British Empire will, in the future, we may confidently hope, render nobler and still more noble service to the cause of Liberty, Justice, Peace, and Civilization, to Learning, by which alone Democracy can be saved from its pernicious, nay, its deadly enemies, the demagogues; to Science, which knows no national boundaries; and to Humanity, which is above all nations."

THE LAW OF PRIMOGENITURE ON TRIAL.

As we go to press it is announced by cable, that a radical change is likely to be made in England in the time-honoured law of Primogeniture.

Amongst the ignorant and unthinking a change from the old established order of things is too often looked upon as desirable, simply because it is a change. Others imagine that, because there are some hardships, these must be remedied. The world knows of no human law which has ever been, or ever will be perfect, so long as its inhabitants remain as they are. The old maxim "Humanum est errare" is fundamental, and accepted by every philosopher since Adam and Eve lost Paradise. It is.

of course, equally true that many great and beneficent changes for the betterment of our race have been made since then; the only question, therefore, is as to whether the change now suggested, whilst it may remedy some hardships, will not introduce others which will more than counterbalance the benefits which it is claimed will ensue. The best that humanitarians and legislators can attain to is to do the most good to the greatest number. May it not be that in the long run this proposed change will, to some extent, tend to weaken rather than strengthen the fibre and virility of the race. It is a true saying that "Hard cases make bad Law," and it may be true that Law, which gives the bulk of a man's property to an eldest son may seem unfair to younger ones, but there is another side to the question.

It is, perhaps, impossible to speak with any certainty as to the effect of the abolition of the law of primogeniture on the national character, and it may not be much of a factor after all; but it may reasonably be argued that it must have some influence.

At present the eldest son, in cases of intestacy, inherits the father's real estate. The eldest son as a rule stays on the land as the head of the family, realising, almost necessarily, something of the responsibility of such a position. This position enables him to lend a helping hand to a younger or a needy member of the family who is going out into the world to seek his fortune. The eldest son remains at home and is, or should be, a steadying force, upholding the traditions of his forefathers as to family life, an institution which has largely made England what it is to-day. He keeps the family together, thus recognising the importance of the habit of home life, without which people drift from their moorings, lose the steadying influence of religion, and acquire the idle, frivolous and demoralizing habits so characteristic of the present day.

Now, as to the younger sons. As to these we must look ahead a few years. Are they after all to be pitied? As a rule quite the reverse. We merely quote history, when we say that nearly all those who have brought glory to the Empire abroad or become famous at home have been younger sons, who have had to make their own way in the world. The same principle

applies somewhat differently in other stations in life. Let us take one illustration only. Was the poor lad, who left Scotland to make a living abroad on the inhospitable shores of Labrador, who eventually amassed an immense fortune, lived a life of national usefulness, and died as Baron Strathcona and Mount Royal, to be pitied? If this "noble army" had stayed at home, each living on a few divided acres, eaking out a bare subsistence, we might indeed pity them. We all know about these things, and the lesson is obvious. It *is* best for the younger ones to go out and get to work. They really get a "better chance" than the home boy. They take it, and they, and the family that grows up around them are glad and want no pity. The youngest son in a large family who writes this believes in primogeniture.

As no the details of the proposed Act, which goes by the name of the Law of Property Act, have come to us, it is impossible to criticise it. It will, of course, be fully discussed in our legal exchanges and thus give us much interesting information.

RIOTS.

In these days when the newspapers tell us almost daily of riotous proceedings more or less serious in some part of the world, far or near, happily not in our own country, it will be handy to have a definition of what a riot really is, not what it is occasionally supposed to be, but what the law means by the expression. A legal correspondent of The Times in a recent issue deals with this and some kindred offences. We cannot do better than quote his words as follows:—

"In a case heard by Mr. Justice Shearman a few weeks ago the plaintiff successfully claimed compensation from the Receiver of Metropolitan Police—out of public funds, in other words—because a considerable part of the woodwork of a derelict and dilapidated house was used as fuel for bonfires in the Peace Night festivities of June 28, 1919, and on the evidence before him the Judge came to the conclusion that there had been a "riot" in the legal sense of that term. He appears to have arrived at that decision with some hesitation, and owners of property should by no means draw from his finding the conclusion that any and every merry-making in which damage may be done

will entitle them to compensation under the Riot (Damages) Act, 1886.

The term 'riot' includes two distinct offences. To constitute a riot at Common Law, which was the offence proved in the case referred to, there are five necessary elements:—

(1) A number of persons, three at least; (2) common purpose; (3) execution or conception of the common purpose; (4) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. (See *Field* v. *Receiver of Metropolitan Police,* 23 The Times L.R. 736; [1907] 2 K.B., 853.)

If any one of these five elements is absent it is not a riot. If they are present it is a riot, whether the common purpose in itself be lawful or unlawful, unless the case is one where the law authorizes the use of force, as, for example, if a number of persons collect for the purpose of suppressing a riot actually in progress. It may further be observed that the common purpose must be of a private character, such as forcing a particular employer to give better conditions to his workpeople, or the removal of obstructions to an alleged right of way. If the common purpose be of a public character, such as to compel the Government to change its policy, or to destroy all rights of private property, the offence is not riot, by high treason by 'levying war.'

It is one the question of violence causing alarm that claims for damages for riot are apt to break down: for on occasions of public rejoicing a crowd may become noisy and even destructive and yet remain perfectly good tempered, so that no reasonable person would be alarmed at their demonstrations.

Riot at Common Law is a misdemeanour, punishable by fine and/or imprisonment. Under section 1 of the Riot Act, 1714, riot in certain circumstances is made a felony; this felonious rioting was originally a capital offence, but is now punishable by penal servitude for life or any less term. To constitute the offence there must be at least twelve persons 'riotously and

tumultously assembled together to the disturbance of the public peace'; they must continue riotously and tumultously together for one hour after the proclamation in the King's name (commonly called 'The Riot Act') ordering them to disperse has been read by a Justice of the Peace or other authorized person.

Demolition of houses or other buildings by rioters is also a statutory felony punishable with penal servitude for life, whether the riot be at common law or under the Riot Act, and for damage not amounting to demolition seven years' imprisonment may be awarded.

Such, in its broad outlines, is the English law as to riot. But persons contemplating the execution of a common purpose may be guilty of two lesser offences, which are deserving of a passing notice. The mere assembling together of a number of persons in circumstances calculated to endanger the public peace is an "unlawful assembly" punishable as a common law misdemeaaour with fine and/or imprisonment. Intermediate between unlawful assembly and riot is the offence of 'rout.' An unlawful assembly becomes a rout when a motion is made towards the execution of the common purpose: it is a riot, complete except for the execution of the purpose.

The four stages of the rioter's progress may be made clear by an illustration. At 6 p.m. A, B, and C meet and arm themselves with axes and crowbars and say, 'We will go and smash D's new factory.' That is an unlawful assembly; it remains an unlawful assembly during the preparatory process of filling themselves with Dutch courage and Government ale at the nearest publichouse. But when, at 7 p.m., they start to walk to D.'s premises to carry out their design it becomes a rout, and continues a rout through the intermediate calls for fresh supplies of Dutch courage. Arriving at D.'s factory at 8 p.m., the first blow is struck and, assuming their demeanour shows an intention to resist interference by force and is calculated to alarm even one reasonably courageous person, the rout has become a common law riot. By 9 p.m. nine other men have joined in the destruction. A magistrate may now 'read the Riot Act,' and at 10 p.m. the 12 rioters, if they are still making merry with D's property, become statutory rioters and guilty

of felony. But if one has by that time thought discretion the better part of valour, the other 11 cannot be charged with the felony."

LEGISLATION PROHIBITING THE EMPLOYMENT OF ALIENS.

The Supreme Court of Canada having been asked by the Governor in Council of Canada for an opinion as to the validity of the legislation of the Province of British Columbia on the above subject, has set forth the views of the various Judges of that Court on various points that came up for discussion. These opinions will appear in the report of the case in the Supreme Court reports. We trust the Government has got what it wanted in the first finding, though with dissent from two voices. As to other points—*quot homines, tot sententiæ.*

Speaking generally and without enquiring whether this reference and the findings thereon are of a Court of final jurisdiction, how refreshing it would be if the judgments of such a Court were, and were stated to be, pronouncements of the Court, free from the cloudings and mystifications attending the examination of numerous dissenting and dubitante opinions ushered in by the heading "Per." This doubting and disagreeing habit has become all too common with certain of the Judges of our Supreme Court. What is wanted is the law on the subject; not the views of one or other of the members of the Court. These might be dealt with before the Judges come into Court to pronounce the judgment of the Court.

The head note of the report as to this reference will be much as follows:—

"The Legislature of British Columbia in 1921 passed an Act (11 Geo. V. c. 49) purporting to 'validate and confirm (an) Orders in Council' which provided that 'in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith.' "

It was held that the legislature of British Columbia had no authority to enact this legislation. Idington, J., and Brodeur,

J., *contra* as to the part relating to Chinese.

Per Davies, C.J., and Anglin and Mignault, JJ.—This legislation is *ultra vires* the provincial legislation, as it establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament conferred by s. 91, s.s. 25 of the B.N.A. Act, in regard to "naturalization and aliens." *Union Colliery Co.* v. *Bryden* ([1899] A.C. 580), followed.

Per Idington, J.—Under section 109 of the B.N.A. Act, made applicable to the Province of British Columbia when brought into the Dominion, it was enacted that "all lands, mines, minerals and royalties belonging to the provinces" shall remain the property of these provinces; the mode of administration of any of these properties by the province is subject to the will of the legislature as the administration of a private property to the will of its owner; and as a private owner would have the right to stipulate in a contract the same conditions as those contained in the above statute, this legislation is *intra vires* of the province.

Per Duff, J.—The provincial statute would be *intra vires* of the provincial legislature as it is enacted in the exercise of its control over its public assets and of its power of appropriation which is equivalent to property; and sections 102 to 126 of the B.N.A. Act exclude from Dominion control any power of appropriation over the subjects assigned to the provinces; but, as part of this legislation is repugnant to the "Japanese Treaty Act" and as the whole provincial statute views Japanese and Chinese as constituting a single group, it must be treated as inoperative *in toto,* since it cannot take effect according to its term. *Bryden's* case (*supra cit.*), distinguished.

Per Brodeur, J.—In its leglislation, the Legislature of British Columbia deals with its own Crown lands and enacts that a certain class of persons, whether British subjects or not, will not be permitted, by reason of racial descent, to work on those lands; this is a question of internal management which, according to c. 92, ss. 5 of the B.N.A. Act, is within the competence of the local authority.

The Japanese Treaty, made in 1911, between England and Japan, was sanctioned and declared to have the force of law

in Canada by a Dominion statute enacted under the powers conferred by s. 132 of the B.N.A. Act (3 & 4 Geo. V. c. 27). Paragraph 3 of article 1 of the treaty states that the subjects of the high contracting parties "shall in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects of citizens of the most favoured nation."

It was held by Davies, C.J., and Duff and Brodeur, JJ., that the provincial statute of 1921, as to its part relating to Japanese, is *ultra vires* of the legislature of the province as being in conflict with the Japanese Treaty. Idington, J., *contra*.

LAW OF DIVORCE IN CANADA.

By C. S. McKee, of the Toronto Bar.

(Continued from April issue)

1. Neither party an infant, insane, intoxicated, or impotent —obviously no question arises.

2. One party only an infant, insane, intoxicated, or impotent. If the other party has knowledge of the incapacity, then it would appear that no action should lie at the instance of that party. In the case of insanity an action should lie at the instance of the Crown, and the Criminal Code should provide punishment for the guilty party. If the party with full capacity marries in ignorance but later learns of the incapacity of the other, then in cases of insanity and impotency actions should lie at the instance of the former, provided the necessary action is taken within a reasonable time of the receipt of the knowledge. Actions by the incapacitated person are the same as in the next class, except that a person knowing of his or her impotency should not be allowed to plead it as a ground of nullity, but should if he or she married in ignorance of it.

3. Both parties, infants, insane, intoxicated, or impotent.

(a) Infants—action tenable by guardians while infancy exists or by either party acting within a reasonable time of coming of age.

(b) Insane persons—action tenable by Crown, by committee, or by either party acting within a reasonable time of ceasing to be under the incapacity.

(c) Intoxicated persons—action tenable by either party acting within a reasonable time of ceasing to be intoxicated.

(d) Impotent persons—a person who marries knowing him or herself to be impotent should of course not be permitted to plead the other party's impotency as a ground for nullity.

The remarks above in regard to form apply to cases of consanguinity and bigamy.

The grounds additional to the above recommended by both majority and minority report of the British Commission on Divorce in 1912 were:

1. Unsoundness of mind less than insanity not apparent at the time of the ceremony, and provided intercourse has ceased after the situation became apparent, and action is started within a reasonable time.

2. Epilepsy and recurrent insanity—as in 1.

3. Venereal disease in a communicable form, and the fact not disclosed at the time of marriage—as in 1.

4. Woman pregnant at the time of her marriage, her condition being due to intercourse with a person other than her husband, and such condition being undisclosed by her to her husband who is ignorant of the fact.

5. Refusal without reasonable cause to permit of intercourse where there has been no intercourse at all.

In passing, it might be noted that adultery, etc., on the part of the plaintiff is no defence in actions of declarations of nullity.

Residence less than domicile is sufficient to give jurisdiction for declaration of nullity—as noticed as the end of the chapter on Provinces with Divorce Courts.

The question of jurisdiction in suits for declarations of nullity is of sufficient importance, and so far as Ontario and Quebec are concerned is still in a sufficiently unsatisfactory state, to warrant a more complete investigation than that made above when considering the question of infancy. Where Provincial Courts have jurisdiction over divorce, they have also jurisdiction over annulment, the one having in all cases been established with the other.

The first case in Ontario in which the question of jurisdiction appears to have been discussed was *Lawless* v. *Chamberlain* (1889), 18 O.R. 296. This was an action for annulment on grounds of duress and infancy. In dismissing the action on the

merits. Boyd C. said, at p. 297: " . . If the alleged marriage has been procured by fraud or duress in such wise that it is *void ab initio,* judgment of nullity may be given by the Court." Mr. Holmested, in his book Matrimonial Jurisdiction in Ontario and Quebec questions at some length the soundness of the reasons given for the judgment. The next case of importance was *T.* v. *B.,* (1907), 15 O.L.R. 224, where the same Judge decided that the Court had not jurisdiction, drawing a fine and rather doubtful distinction between the two cases. In *May* v. *May,* (1900), 22 O.L.R. 559, an attempt was made to obtain a declartion of nullity on grounds of consanguinity; the trial Judge held himself bound by *Lawless* v. *Chamberlain* in regard to jurisdiction, but on appeal this was overruled. In *A.* v. *B.,* 23 O.L.R. 261, it was also held that the Courts did not have jurisdiction. Clute J., here pointed out that the power to make a declaratory judgment did not enable the Court to do so in cases in which it had no jurisdiction over the subject matter in controversy. There is certainly no inherent jurisdiction over the question of annulment; when Upper Canada was given self government it was given power to establish Courts and confer on them jurisdiction; this jurisdiction it proceeded to define by reference to the Common Law and Chancery Courts in England, none of which at the dates referred to had jurisdiction over the subject in question, this then being in the hands of the Ecclesiastical Courts. Middleton J., took the same view in the *Reid* v. *Aull,* 19 D.L.R. 309, 32 O.L.R. 68; but in *Peppiatt* v. *Peppiatt,* 30 D.L.R. 1, 36 O.L.R. 427, the Appellate Division overruled all these cases, and decided that under the power to make declaratory judgments, R.S.O., ch. 56, sec. 16 (b), the Court had jurisdiction. This last decision will hold until it is overruled by a higher Court, but that it is sound law appears to be most doubtful, as if the theory were pressed to its logical conclusions there would be few if any parts of the field of purely Dominion matters which the Provinces could not invade. It would appear that the Court in a recognition of what was desirable as distinct from what existed had pushed a technicality to its limit, if not beyond.

In Quebec, under the French regime, marriage was under the jurisdiction of the French Ecclesiastical Courts; but with the conquest, these Courts, as did all other Church Courts, ceased to have any official status; and such jurisdiction was not conferred on any new Court. True, the Code Civil (ch. 4) en-

acted before Confederation gives grounds for annulment, but it does not confer jurisdiction on any Court—admitted an anomalous state of affairs, and a rather doubtful one in view of the opinion of the Judges in *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956, as to the impossibility of a statute existing without a Court to enforce it; when this particular part of the Code was adopted, the Ecclesiatsical Courts could enforce its provisions; their jurisdiction was abolished—*ipso facto* the Civil Court, one would think, obtained jurisdiction. Without, as it would appear, any legal sanction whatever, the Judges of Quebec have chosen to give a legal sanction to the decrees of Roman Catholic Bishops, the latter making declarations of nullity which are enforced by the Civil Court. True, such a practice would be perfectly correct in regard to purely spiritual affairs distinctly within the realm of the church, as it would for example in regard to the rules of a trade union *qua* union, but is distinctly incorrect in matters where civil rights are in question. The attempts of the Roman Catholic Church to have annulled marriages between Catholics celebrated by a Protestant minisister are clearly beyond their authority until such an enactment is put on the Provincial Statute Book. This was recognised in the *Hebert* case in so far as lack of jurisdiction on the part of the R. C. Bishop was concerned, but it was apparently not even questioned as to the jurisdiction of the Civil Court itself. The matter appears to have been cleared up at last by tne *Tremblay Marriage* case, decided by the Privy Council in 1921, 58 D.L.R. 29, [1921] 1 A.C. 702, 27 Rev. Leg. 209.

5. Grounds for Divorce.

In considering the grounds on which, in Canada, an application may be made for a divorce, it should be kept in mind that the Roman Catholic Church holds strictly to the theory of the indissolubility of a properly celebrated and consummated marriage, and does not recognise divorce on any ground.

Divorce, as pointed out by Senator Gowan in 1888 during the discussion which arose on the proposal to establish a Divorce Court, is not only a question of the effect on the parties themselves, but of the effect in relation to morals and good order—in short upon the well-being of the community. "Divorce has been substantially recognised as a matter involving the happiness and morality of society, and consequently to be treated in the spirit of the moralist as well as of the jurist." (Bourinot's Parliamentary Procedure, 4th ed., p. 627.) The position of the

State in regard to the grounds for divorce is summed up in the Minority Report of the British Royal Commission of 1912 as follows: ". . . It (the State) has a concern of its own in the peace of the community, the welfare of the family, the rearing of healthy children, and the training of good citizens, which renders it imperative that the making and breaking of marriage contracts should be treated as matters of public importance touching the commonwealth itself, and not as merely private transactions only affecting the parties." Dicey in Conflict of Laws points out that the doctrine maintained by the Courts of a country in regard to divorce depends on the view entertained in regard to the nature of divorce, and summarises these views under the heading of contractual, penal, and status theories. That the right to rescind the marriage contract much as one rescinds any other contract has not been recognised is apparent to any thinking person; divorce is but rarely looked upon as punishment for a crime—in fact in cases of lunacy, such a view is out of the question; rather divorce is the extinction by the State of a status—the status of husband and wife—the discontinuance of which is expedient for the purpose of giving relief to the person injured.

The grounds for divorce recognised before the Reformation by the Ecclesiastical Courts were very numerous, but the decree, it should be remembered, was one of annulment rather than of divorce as understood to-day. The grounds were: error as to person, error as to condition, vow of chastity on entering religious order before marriage, consanguinity, crime, disparity of worship, duress, preceding marriage, public decorum in being solemnly betrothed to another, madness, affinity, clandestinity, impotency, and rape. After the Reformation the grounds for divorce were limited to consanguinity, previous marriage, corporeal imbecility, and mental incapacity. In England during the period of divorce by Private Acts of Parliament, of the two hundred and forty-nine Acts passed only four were in favor of wives, the first being that of a Mrs. Addison in 1801; all of the remainder were granted to the husband on account of the wife's adultery; in two of the four cases, the adultery was incestuous; in the third there was profligacy, deceit, abandonment, and gross injury; in the fourth, there was bigamy. The Act of 1857 (Imp.), ch. 85, practically adopted the former parliamentary practice in regard to grounds for divorce. Under this Act a man

may obtain a divorce on the ground of his wife's adultery; but a woman to get a divorce must prove (sec. 27):

1. Incestuous adultery, *i.e.*, within the degrees prohibited for marriage on account of consanguinity or affinity, or 2. Bigamy and adultery, or 3. Rape, or 4. Sodomy or bestiality, or 5. Adultery coupled with (a) such cruelty as without adultery would entitle her to a divorce *a mensa et thoro*, which has been defined as such conduct as makes it unsafe, having regard to risk of life, limb, or health, bodily or mental, for one married person to continue to live with another; or (b) desertion without reasonable excuse for two years or upwards, which in practice has included wilful refusal to permit of marital intercourse without reasonable excuse.

In Canada the British law is in force in British Columbia, Alberta, Saskatchewan, and Manitoba; it being necessary in these Provinces for a wife to prove as above, it might be expected that in cases of mere adultery women would resort to parliamentary divorce which does not recognise any disparity between the sexes, but in practice this has not occurred. The grounds provided by the New Brunswick and Prince Edward Island statutes are: 1. Frigidity or impotence, 2. Adultery, 3. Consanguinity. In Nova Scotia, the Act provides that marriages may be declared null and void for: 1. Impotency, 2. Adultery, 3. Cruelty, 4. Consanguinity.

The Parliament of Canada of course can grant divorces on any grounds it sees fit, but as a matter of policy and good morals it is universally recognised that the power should not be exercised arbitrarily and without cause but only for

> ". . . . Such a deed
> As from the body of contraction plucks
> The very soul. . . ." (Hamlet, act 3, scene 4.)

The practice has been for Parliament to place both sexes on an equality in regard to divorce; this means that a wife can obtain a divorce on the ground of a simple act of adultery on the part of her husband without having to prove any of the additional grounds required to be proved in England and in Provinces following English law. The grounds now recognised by Parliament are: 1. Adultery—alone, or accompanied with desertion, cruelty, desertion and cruelty, or bigamy; 2, bigamy; 3, incestuous adultery; 4, rape; 5, sodomy and unnatural offences; 6, bestiality; 7, malformation at time of marriage; 8, impotency;

9, nullity of marriage owing to fraud when there has been no consummation by cohabitation; 10, refusal of sexual intercourse.

In regard to adultery, it is not necessary in order to succeed to prove the actual fact of adultery; in nearly every case the fact is inferred from the proof of circumstances which shew the opportunity for the act, and which lead to the conclusion that it occurred, *e.g.*, travel together and registration as man and wife and occupation of the same room, or the visiting of a brothel, unless very clear evidence is given that adultery did not in fact occur. The evidence of a woman of loose character with whom the act is said to have occurred will be very closely scrutinised; and the evidence of the husband or wife alone is not sufficient unless corroborated by another witness or by strong circumstantial evidence, and particularly so where the fact is sought to be proved by admission. Proof that the respondent has contracted venereal disease not from the applicant is sufficient evidence of adultery; and in the *Browning* case, [1911] P. 161, 80 L.J. (P.) 74, it was held that it is sufficient for a wife to prove that she was infected by the husband, it being then for him to prove that he acquired the disease otherwise than by adultery. Proof of venereal disease must be by medical testimony.

The cases where bigamy is pleaded usually arise in connection with so-called American divorces. This subject necessitates a return to the question of jurisdiction. It has already been observed that domicile is an essential according to English law to establish jurisdiction; and that with the exception of desertion by the husband, a wife can not acquire a domicile separate from that of her husband. The American State laws do not recognise this principle to the same extent; in many of them, a wife can acquire a domicile separate from that of her husband, and that by a very short residence. Moreover, most of the States grant divorces for causes not recognised in Canada. As a result, cases are constantly occurring of wives deserting their husbands, taking up for the necessary time what in reality is only a temporary residence in one of the States, frequently Nevada, and then getting there a divorce on grounds which are not recognised in Canada as sufficient; with the result that in one State even of the American union she may be regarded as divorced, while in another and in Canada she is not so regarded. This result of different laws in the United States is often held up to ridicule, and quite properly so, as the situation is as absurd as it is

unjust; buf, at the same time, it should be remembered that a similar situation has existed for years in regard to divorces granted by Scottish Courts to English wives, and by the Courts of New South Wales to wives from other parts of Australia. A remarriage after such an American divorce is bigamous, and affords in Canada a ground for divorce. The recognised English law on the matter is stated by Dicey as follows, at pp. 381, *et seq.*: "The Courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings, even though the ground for divorce is not recognised in the country of domicile at the time of the marriage or in the country of which the parties are subjects. The leading case on the point is *Bater* v. *Bater,* [1906] P. 209, 75 L.J. (P.) 60: "The husband and wife were British subjects domiciled in England; after their marriage the husband acquired a domicile in New York; the wife obtained in New York a divorce on grounds recognised there, but not so recognised in England; the divorce was held to be valid." Dicey goes on to explain that the Courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings, with the exception that the Courts of a foreign country where the parties are not domiciled have jurisdiction for English purposes to dissolve a marriage, if the divorce granted by such Courts would be held valid by the Courts of the country where at the time of the proceedings the parties were domiciled. The leading case here is *Armytage* v. *The Att'y-Gen'l,* [1906] P. 135, 75 L.J. (P.) 42: The husband was domiciled in New York; his wife obtained a divorce in South Dakota; the New York Courts treat this as a valid divorce; it is therefore treated as valid by the English Court. As already explained in the chapter on jurisdiction in Provinces with Divorce Courts, a party can not for purposes of divorce give a Court otherwise without jurisdiction the right to try the action. At one time it would appear that this was not so—see *Stevens* v. *Fisk* (1885), Cam. Cas. 392, but the principle is certainly followed at Ottawa in regard to applications by men who have previously ill-advisedly consented to the jurisdiction of the American Courts — see the *Campbell* case of 1914 and the *Gordon* case of 1921. It might be pointed out before leaving the question of foreign divorces that in *C.* v. *C.*

(1917), 33 D.L.R. 151, 38 O.L.R. 481, affirmed 39 O.L.R. 571, it was held that a divorce granted by a foreign Court being a judgment affecting the status of the parties, stands upon the same footing as a judgment *in rem*, and can therefore not be set aside in this country even on the grounds of fraud by a person not a party to the proceedings in which the judgment was pronounced. One logical and beneficial result of this decision is that men marrying Canadian women who have obtained invalid divorces in the U.S.A. must either support them or bring an action for annulment on the ground of a previous marriage; they can not in an action for non-support or alimony set up as a defence the divorce. Canadian Courts, once jurisdiction has been shewn, will not open a foreign divorce unless it is shewn that there has been fraud, *e.g.*, no notice to the respondent. Also, it has been held that a foreign divorce to be good must be absolute, *e.g.*, no restriction imposed on the guilty party in regard to not marrying again; but the foreign Court can say that neither party can re-marry for a certain time, this being regarded not as the imposition of a disability, but as the fixing of a time from and after which the dissolution shall be regarded as complete. Lastly, it has been held in Ontario that even if the foreign divorce is one not recognised in Canada, yet the party invoking the jurisdiction is bound by it. *Swaizie* v. *Swaizie* (1899), 31 O.R. 81; 31 O.R. 324: American divorce with alimony given payable out of husband's Ontario lands; this action was one for the alimony; defence was invalidity of the American divorce; held that he had invoked the American jurisdiction and was bound by it. In *Re Banks* (1918), 42 O.L.R. 64, a wife set up the invalidity of a divorce she had obtained in Chicago in claiming her husband's insurance; held she had invoked the jurisdiction and was bound by it. The test has never been made as to whether these last two decisions would hold in the case of a party realising that they had secured a divorce which was not recognised in Canada suing for a divorce in Canada, on say the ground of adultery which the other party had committed subsequently to the invalid American divorce; the natural defence would seem to be to plead the latter divorce; yet it hardly would seem reasonable or just that the plaintiff should be debarred from pleading its invalidity and therefore the adultery.

The subjects of impotency, fraud, and refusal from the first to have sexual intercourse have been dealt with in the chapter on annulment of marriage. The first cases granted on the latter ground were in 1919, and its adoption indicates the tendency of Parliament to grant relief on grounds generally recognised in England as sufficient to warrant a declaration of nullity. In England, if the refusal results from incompetence, a decree of nullity may be had. If it is simply wilful and without reasonable cause and there has been no intercourse, the Court has regarded the refusal as rebuttable evidence of incompetence, and if there has been intercourse as evidence of desertion. In the cases which have come before Parliament, the refusal had existed from the first, and had been wilful. The English Divorce Court has held that mere wilful refusal to have intercourse is not in itself sufficient ground for divorce—*Napier* v. *Napier,* [1915] P. 184, 84 L.J. (P.) 177, overruling *Dickinson* v. *Dickinson,* [1913] P. 198, 82 L.J. (P.) 121. The Court merely draws the inference of incapacity from the persistent refusal to consummate—*M.* v. *M.* (1906), 22 Times L.R. 719—and of course the inference may be rebutted, and mere refusal of itself is not a ground for divorce.

An investigation of the grounds for divorce throughout the British Empire shews the following as existing in addition to those already recognised by the Parliament of Canada:

(Report of the Royal Commission on Divorce and Matrimonial Causes—1912—England.)

1. Desertion, wilful—Scotland, 4 years; South African Provinces, as low as 18 months—Natal; Australia, 3 to 5 years; New Zealand, 5 years.

2. Imprisonment, either frequently or for long period—South Africa, Australia.

3. Habitual drunkenness, usually coupled with neglect of duty or cruelty—Australia, New Zealand.

4. Cruelty—Australia.

5. Insanity, confinement—New Zealand, 10 years; West Australia, 5 years.

6. Long absence—Cape Colony.

The following summary of grounds for divorce in the United States is taken from the Report on Marriage and Divorce of the Bureau of the Census 1867-1916 (South Carolina does not permit

of divorce on any ground, leaving 49 States for which to be accounted, including the Indian Territory):

	No. of States where divorce allowed.	Annulment.
Desertion—Abandonment or desertion	46	
Refusal by wife to move to State with husband—Tennessee	1	
Cruelty—Extreme cruelty	36	
Attempt to take life of other party to divorce	3	
Violence endangering life	7	
Indignities and defamation	9	
Sexual immorality—Adultery	49	
Crime against nature whether with man or beast—Alabama	1	
Lewd conduct indicating unchasteness without actual proof of adultery—Kentucky	1	
Loathsome disease, contracted before or after marriage—Kentucky	1	
Intemperance—Habitual drunkenness	39	
Habitual use of drugs	4	
Neglect of responsibilities—Neglect to provide	17	
Neglect of duty	8	
Defects of disposition—Violent temper	2	
Intolerant religious belief	2	
Crime—Conviction or imprisonment	41	
Fugitive from justice	2	
Previous divorce in another States	3	
Misconduct	2	
Vagrancy	2	
Voluntary separation	3	
Civil death, treated as so for crime—Rhode Island	1	
Presumption of death	2	
Causes deemed sufficient by the Court—Washington	1	

Lack of real consent to marriage—Duress or force	4	19
Fraud	8	19
Incapacity to contract marriage—Mental	8	26
Want of age..	1	27
Personal unfitness to contract marriage—		
Impotency	37	18
Pregnancy	15	
Illicit carnal intercourse by wife before marriage	3	
Illegality of marriage—Bigamy	12	25
Consanguinity	4	22

Several States do not recognise annulment on any of the above grounds, while several recognise it on as many as eight. In New York and the District of Columbia, the only recognised ground for divorce is adultery, although both allow annulment of marriages on several other grounds. On the basis of number of grounds for divorce, Kentucky leads with 15; Tennessee, Rhode Island and Washington are next with 12, and Pennsylvania, Georgia and Mississippi next with 11.

(To be continued in June issue)

Review of Current English Cases

(Registered in Accordance with the Copyright Act.)

By CECIL CARRICK, Barrister-at-Law.

Landlord and tenant—Covenant against sub-letting.

Freeman v. *Evans* (1922), 1 Ch. 36. (Court of Appeal). A lease contained a provision against the tenant sub-letting without the previous license in writing of the landlords. The tenant gave notice to his sub-tenants terminating their tenancy, and subsequently cancelled it upon the sub-tenants submitting to an increased rent. It was held that the notice to quit and its subsequent withdrawal created, as between the tenant and his sub-tenants, a new tenancy. This constituted a breach of the covenant against underletting in the lease, and the landlords recovered possession of the whole of the premises.

Constitutional law—Legislative power of Dominion of Canada—Combines and Fair Prices Act (1919)—Property and civil rights.

In re The Board of Commerce Act (1919) *and The Combines and Fair Prices Act* (1919). 1922 1 A.C. 191. This was an appeal from the Supreme Court of Canada. The Combines and Fair Prices Act, enacted by the Parliament of Canada in 1919, authorised the Board of Commerce, created by another Statute of that year, to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the Provinces as that Board might consider to be detrimental to the public interests; also to restrict accumulation of food, clothing and fuel beyond the amount reasonably required, in the case of a private person, for his household, and in the case of a trader, for his business; and to require the surplus to be offered for sale at fair prices. It was held that the Acts were *ultra vires* the Dominion Legislature since they interferred seriously with property and civil rights in the Provinces, and were not passed in any highly exceptional circumstances, such as war or famine, which might render trade combinations and hoarding subjects within the general power given by s. 91 of the British North America Act, 1867. The power of the Dominion Parliament to pass these Acts was not aided by the ancillary provisions attaching criminal consequences to any breach, because the matter did not by its nature belong to the domain of criminal jurisprudence. Circumstances are conceivable, however, such as those of war or famine when the peace, order and good government of the Dominion might be imperilled under conditions so exceptional that they might require legislation of a character in reality beyond anything provided for by the enumerated heads in either s. 92 or s. 91 of the British North America Act.

Arbitration—Award—Finality.

Attorney-General for Manitoba (*appellant*) *and Kelly and Others* (*respondents*), Privy Council, 1922, 1 A.C. 268. This was an appeal from the Court of Appeal of Manitoba. By a consent judgment, sums to be debited and credited in respect to a claim for monies improperly paid under a building contract, and for damages, were to be determined by two apprais-

ers; and any matter upon which they differed was to be referred to a named umpire whose decision was to be final; and the Manitoba Arbitration Act was not to apply. Upon the defendants moving to set aside or vary the award made it was held that when there is difference of opinion between the parties as to the authority conferred on an umpire, the decision rests ultimately with the Court, but in other respects, in the absence of statutory provisions, where there is no error apparent on the face of the award, it cannot be questioned either on the facts or on the law, unless the umpire himself states that he has made a mistake of law or fact, leaving it to the Court to review his decision.

Constitutional law of Canada—Disallowance of Provincial Act—Accrued title.

Wilson and Others (appellants) and Esquimalt and Nanaimo Railway Company (1922), 1 A.C. 202 (Privy Council). This was an appeal from the Court of Appeal of British Columbia. By s. 56 of the British North America Act, the Governor-General in Council may disallow an Act passed by a Provincial Legislature within one year after receipt of a copy, as provided for, and such disallowance shall annul the act from and after the day of its signification. The defendants, in this action (appellants), had received a Crown grant of land in the Province of British Columbia in virtue of an Act passed by the Legislature of that Province. This Act was subsequently disallowed. The plaintiff (respondent) claimed under a grant from the Dominion Government in settlement of a dispute, and contended that the disallowance of the Act invalidated the title of the defendants. It was held that as to private rights completely constituted, and founded upon transactions entirely past and closed, the disallowance of a Provincial statute is inoperative.

Negligence—Public park—Poisonous shrub—Child eating poisonous berries.

Corporation of the City of Glasgow (appellants) and Taylor (respondent) 1922, 1 A.C. 44, (House of Lords.) This was an appeal from an interlocutor of the Second Division of the Court of Session in Scotland, recalling an interlocutor of the

Lord Ordinary. A shrub bearing poisonous berries of a tempting appearance was grown by the defenders (*appellants*) in an enclosed piece of ground, to which access was had by a gate which could be easily opened by small children. The pursuer's child, aged seven, ate some of the berries and died. In an action for damages the Lord Ordinary held that these facts disclosed no cause of action and dismissed the case. The Second Division recalled the interlocutor of the Lord Ordinary, and approved an issue for the trial of the action. Held, on appeal, that *Cooke* v. *Midland Great Western Railway Company of Ireland* (1909 A.C. 229) applied and that "the presence in a frequented place of some object of attraction, tempting a child to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness of the object of peril."

Contempt of Court—Circular letter commenting on judgment — Misrepresentation of effect — Motion for injunction.

Dunn v. *Bevan, Brodie* v. *Bevan* (1922), Ch. 276. Sargant, J.:—The plaintiffs in an action brought by members of a trade union against the officers of the union, issued a circular letter, after judgment had been given in the action, containing misleading comments on the judgment. The defendants thereupon moved for an injunction restraining the plaintiffs from distributing the circular. It was held that this was an attempt to have the issue of the circular treated as a contempt of Court, and the plaintiffs punished by granting an injunction against them, and by making them pay the costs.

There are only two kinds of contempt which can arise from conduct of this nature, viz.—first, scandalizing the Court by making attacks upon the Judge who presided at the trial; and, secondly, doing something which interferes in some way with the administration of justice. There is no third class of contempt consisting in a misrepresentation of the judgment of the Court, and of the proceedings in Court, for the purpose of injuring one of the parties. Judgment having been given in the action, the proceedings were ended, and there could be no interference with the administration of justice. The remedy must be sought in the ordinary law of libel.

Will—Construction—Residuary gift—Charitable purposes —Discretion of executor as to objects and purposes.

Hales v. *Attorney-General* (1922), 1 Ch. 287, Eve, J.:—In her will a testatrix left in blank the name of her residuary legatee. By a codicil she desired that the residue of her estate be "applied for charitable purposes, as I may in writing direct, or to be retained by my executor for such objects and such purposes as he may in his discretion select, and to be at his own disposal." No written directions were given as to the charities to be benefited. Two questions arose, viz., was there a good charitable trust declared, and if not, did the executor take the residue beneficially, or as a trustee for the next of kin? It was held that there was no good charitable trust, because the executor had a discretion under which he might devote the residue to purposes not of a charitable nature. It was further held that the executor held as trustee for the next of kin, because there was no direct gift to him. He took in a representative capacity by virtue of his office.

Will—Testamentary power of appointment—Covenant to appoint in a particular way—Covenant not to revoke appointment — Will exercising power in accordance with covenant—Subsequent will revoking appointment.

Winckley v. *Winterton* (1922), 1 Ch. 292. Russell, J.:—The donee of a special testamentary power of appointment covenanted by deed to appoint to her son out of a trust fund not less than £4,000, and not to revoke that appointment. She executed a will making such appointment, but afterwards executed another will, revoking the first, by which she appointed a sum of less than £4,000.

It was held that the deed of covenant had no legal operation at all. The donee of a special testamentary power of appointment cannot validly covenant to appoint by will in a particular way. Such a power is in the nature of a fiduciary power to be exercised by the appointor's will only; so that up to the last moment of his life he may deal with the funds having regard to the circumstances then affecting the various objects of the power. It is not a proper discharge of the donee's duty to fetter his fiduciary discretion by a covenant executed beforehand. Such a power may, no doubt, be validly released; or

the donee may validly covenant not to exercise the power. But in such a case the objects of the power, if they acquire any benefit in the property, do so under trusts in default of appointment. They derive their benefit from the donor of the power, not as a result of any pretended discretion of the donee exercised under the fetter of an antecedent bargain entered into by him, and in reality depriving him of any discretion at all. *In re Evered* (1910), 2 Ch. 147, can be thus distinguished from this case, in that the benefits secured to the three sons by the covenant to abstain from appointing in a certain manner, flowed from the trusts in default of appointment declared by the donor of the power.

Fatal Accidents Act—Damages—Pension to widow in consequence of death of deceased to be taken into account in assessing damages.

Baker v. *Dalgleish Steam Shipping Company* (1922), 1 K.B. 361 (Court of Appeal). This action was brought by the widow of the deceased, under the Fatal Accidents Act, as a test action for a decision as to whether in assessing the damages the fact that the plaintiff in receiving a pension from the Crown as a result of the death is to be taken into account. Scrutton, L.J., at p. 371 succintly summarises the rights of a claimant under Lord Campbell's Act. It was held that any pecuniary advantage the widow has received from the death must be set off against her probable loss. This is clear if she receives such advantage as of legal right. The same principle applies to voluntary benefits conferred in consequence of the death. Less weight will be given to voluntary contributions than to those made under legal obligation. Still less weight will be given to voluntary contributions in instalments, and still less if the contributor announces he will reduce his contribution by the amount of compensation obtained from the wrongdoer who caused the death.

Contract — Debt payable abroad in foreign currency—Action in England to recover—Depreciation of foreign currency—Payment abroad after action brought—Discharge of debt.

Societe des Hotels le Touquet Paris, Plage v. *Cummings* (1922), 1 K.B. 451 (Court of Appeal). The defendant, an English

lady, having in 1914 contracted in France a debt to the plaintiffs of frs. 18,035, undertook to pay that sum to them in France in French money before the end of that year. She did not pay the money within the time specified. In 1919, by which date the value of the French franc as expressed in English currency had heavily fallen, the plaintiff sued her in England claiming the amount of sterling which would have been the equivalent of frs. 18,035 in 1914. While the action was pending the defendant paid in French money the sum of frs. 18,035 to the plaintiff's hotel manager, who did not know the amount of the debt, and gave a receipt as for money deposited with him, not intending to accept it in full satisfaction. The defendant then pleaded that after action brought she had satisfied the plaintiffs' claim by payment. Two questions arose; first, as to whether the plaintiffs were entitled to payment of the amount of sterling claimed or simply to frs. 18,035; second, as to whether the payment made and retained was accord and satisfaction so as to be a defence to the action. It was held that the debt, being payable in France in French currency, did not cease to be a French debt by reason of its being sued for in England, and as, if the action had been brought in France, the payment made would have been a good discharge of the debt notwithstanding the depreciation of the French franc since the date the money became due, that payment must equally be a good discharge of the debt for the purposes of this action. It was further held that though where money is not paid on the precise day on which it ought to have been paid in performance of a promise the claim is for both the debt and damages for non-payment, and to satisfy the plaintiff's right of action once vested, there must be an accord and satisfaction, which there was not in this case, yet if the debt is paid the damages are merely nominal.

Lawyers' Lyrics.

The following verses have nothing to do with law, but they have to do with a very prominent and beloved member of our Bar of long ago—G. W. Wicksteed, Q.C., Law Clerk of the House of Commons, the tried and trusted friend and adviser of all the leaders of the various Governments since before Confederation and onwards. We like to keep alive the memory of a remarkable man who at the age of 94 wrote lines so full of poetic fancy —and reproduced now, in these days when lawyers' wives and daughters are in the forefront in patriotic and philanthropic work, so bravely and patiently taken up by them in those sad and stirring days, and at a time when we welcome to our ranks members of the fair sex to help the other lawyers in the fight for right against wrong.

The occasion was the opening of an Old Men's Home in Ottawa, started by the wife of a well known Q.C. in 1892:—

Dear ladies, fair and wise and kind
By whose benevolent aid
The scheme to help our pleasant home
A great success was made.

And you, good fellow-citizens,
Who patronized our ball
And danced to give us warmth and light,
We thank you each and all.

We joyed to think our quondam mayor
Would give his help, but then,
Of course, good city fathers must
Be friends of eldermen.

Your choice of secretary, too,
Augmented our delight,
And boded good, for well we knew
Waldo would do the right.

And pondering who might best express
Our gushing gratitude,
We tried to find a city bard
With love for us imbued.

There's one who holds a lyric lamp
To light his fellow man,
And one who bears the warlike name
Of a great Scottish clan.

Both good, but young, so not with us
To sympathize inclined,
And therefore we decided on
The oldest we could find.

He's old and so in sympathy
With us is strong and true,
And in desire to help our home
He tries to rival you.

And being so and feeling thus,
He thanks you for himself and us.

G. W. W.

Bench and Bar

Bar Association Meetings

We have been asked to again remind our readers, especially those on the Western Side of the North American Hemisphere, that the great Bar Association of the United States is to hold its annual meeting this year at San Francisco, on August 9th, 10th and 11th. In the forty-four years of the Association's existence, this is the first time it has met in California. The only time it ever came to the Pacific Coast was in 1908, when the convention was held in Seattle. In view of the recent Limitation of Armaments Conference at Washington and its bearing upon the interests of the United States, "in the region of the Pacific," to use the apt phrase of Secretary Hughes, this convention promises to be of more than ordinary importance. Many distinguished lawyers will be in attendance, and unusually important matters will be considered, both in addresses and debates. Secretary of State Charles Evans Hughes has been invited to deliver the annual address. The significance of this is obvious. Elihu Root, Mr. Chief Justice Taft and many other leaders of the bar will be in attendance. Lord Shaw, one of the most distinguished law lords of Great Britain, who comes to the meeting of the Canadian Bar Association, will be the guest of the American Bar Association,

representing the British Bar. As usual, the National Conference of Commissioners on Uniform State Laws will meet during the week preceeding the session of the Association.

Court Dress for Women

It has been decided what women barristers shall wear in Court. A committee of Judges and Benchers have settled the delicate question for them. Settled it delicately too; for instead of saying "must" they have merely "expressed a wish" that the dress shall conform to the following rules:—

(1) Ordinary barrister's wigs should be worn and should completely cover and conceal the hair. (2) Ordinary barrister's gowns should be worn. (3) Dresses should be plain, black or very dark, high to the neck, with long sleeves, and not shorter than the gown, with high, plain white collar and barrister's bands; or plain coats and skirts may be worn, black or very dark, not shorter than the gown, with plain white shirts and high collars and barrister's bands.

Having been asked so nicely, women barristers should find no reason for rebelling. All hope of seeing the Court turned into a flower-garden seems to have disappeared.

Barrister wigs are of course never worn in Canada nowadays; but would they not be a desirable addition to the costume of lady Barristers? They would be becoming, and we really mean this. Moreover it is important in a business way. Just fancy what an advantage our sisters would have with a jury over an opposing Council of the other sex. Haply we might have a hairless cocoanut with a shiny crown to exhibit! Jurymen moreover would cease to grumble at being called away from business and still think life worth living as they gaze on the awesome, but enticing setting of a pretty face.

Appointments

David A. Macdonald, of Vancouver, B.C., to be a Justice of the Supreme Court of the Province of British Columbia, vice Mr. Justice Clement, deceased. (May 13).

Obituary.

Mr. Justice Clement, of the Supreme Court of British Columbia, died suddenly at Vancouver on the 3rd instant. He was born in Vienna, Ont., in 1858.

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THE CROWN AND ITS COURTS.

GOVERNMENT BY INJUNCTION.

A question has arisen in the Province of Ontario as to whether a court (or a judge having the power of a court) can lawfully refuse to enforce an enactment of a Legislature (which has the right to make such enactment) or to promulgate a judicial order which in any respect changes the wording or character, or lessens the force of such enactment, or seeks to prevent the makers of the law from enforcing it. In other words, can a court or a judge make an order which seeks to enforce its own view as to what it considers the law ought to be, but which it is not? And would not such an order be legally impertinent and practically impotent?

The facts leading up to this question are as follows:—

At the present session of the Legislature an Act was passed entitled The Corporations Tax Act, 1922, which provided among other things that every incorporated company, association or club conducting a race meeting and becoming the custodian or depository of money, bets or stakes, shall deduct and pay to the Treasurer of Ontario for the use of the Province five per centum of the amount bet or staked, and shall pay the amount so deducted to the Treasurer of Ontario. This Act received the Royal Assent shortly before the spring meeting held by the Ontario Jockey Club at Woodbine Park, Toronto.

On the day before the opening of this race meeting, the Ontario Jockey Club issued a writ against the Hon. Peter Smith, Treasurer of the Province of Ontario, and Major-General V. A. S. Williams, representing himself and all other members of the Provincial Police Force, asking for an injunction restraining the defendant Peter Smith, as Treasurer of Ontario, from giving instructions to the Provincial Police Force, or any of them, to stop all racing upon the plaintiff's race-track at Woodbine Park,

or to stop the holding of any further race meetings by the plaintiffs, and restraining the defendant Williams from acting on such instructions, and for a declaration that the Provincial Act is ultra vires. (The closing of the race-tracks was a statutory remedy to prevent evasion of payment of the tax.) The plaintiffs forthwith moved for an interim injunction before Middleton, J., who directed that they pay into court five per cent. of the amount wagered at their race-track, and restrained the defendants in the terms of the writ, as indicated above, until the trial, or other disposition of the action.

The argument of the plaintiffs was that the tax imposed by the Act is indirect taxation, and that the Act levying it is ultra vires. The effect of the injunction granted by Middleton, J., was that the money representing the tax was paid into court, and the Province was unable to secure it when collected. If the injunction had held, the payment of the tax would have been delayed at least for some time. Just how this injunction would have been enforced if the defendants had disobeyed is not apparent. Would Ministers of the Crown have been kept in a Provincial gaol by the officials whom they as such Ministers may appoint and discharge, for carrying out the policy of the Legislature duly enacted? Neither is it apparent how the money paid into Court is to be repaid to its true owners, the bettors, if the Act proves to be ultra vires. In any event any scheme for its repayment out of court would have been applicable for repayment by the Government had it collected the money.

The Provincial authorities did not attempt to move against the injunction in court, but passed through the House the Declaratory Act, 1922. This Act has a two-fold purpose. One is to dispose of the action commenced by the Ontario Jockey Club. The other is to answer the objection that the tax levied is indirect taxation. The latter purpose it seeks to attain by declaring that the true intent and meaning of the recited provision of the Corporations Tax Act, 1922, is that each holder of a winning ticket issued under the pari-mutuel system shall pay a tax of five per centum upon the amount which would be payable to him if no percentage were deducted by the company, association or club; that this tax be collected by the company, association or

club as the agent of the Treasurer of Ontario by deducting five per centum from the total amount bet on every race; and that this sum be paid over to the Treasurer of Ontario at the close of each day's racing.

The Act seeks to attain the first purpose by declaring that "the law is and always has been that no extraordinary remedy by way of injunction, mandamus or otherwise lies against the Crown or any Minister thereof or any officer acting upon the instructions of any Minister for anything done or omitted or proposed to be done or omitted in the exercise of his office, including the exercise of any authority conferred or purporting to be conferred upon him by any Act of this Legislature." The Act also says "any action heretofore commenced or any proceedings heretofore taken in respect of the Corporations Tax Act, 1922, and still pending, and any order by way of injunction heretofore made in any such action or proceedings against the Crown or against any Minister thereof or any officer authorised to act upon the instructions of any Minister, shall be and is hereby forever stayed, save for the purposes of an application or applications for the payment out of court of any moneys that may have been paid into court in any such action or proceedings, and the Crown or any such Minister or officer is hereby declared to be entitled to proceed as if no such action had been commenced or proceeding taken or order made, but such stay shall not deprive the parties to any such action, proceeding or order of any right they may have to proceed by way of Petition of Right."

The provisions staying the action are not without precedent. Sec. 8 of 9 Ed. VII. ch. 19. The Power Commission Amendment Act, 1909, enacts that "every action which has been heretofore brought and is now pending . . . . by whomsoever such action is brought shall be and the same is hereby forever stayed." This Act was held in *Smith* v. *City of London,* 20 O.L.R. 133, to be within the competence of the Legislature and not to be revised by the judicial body. See also *Beardmore* v. *City of Toronto,* 20 O.L.R. 165, 21 O.L.R. 505. The right to bring an action is a "civil right." However, when a motion was made to obtain payment out of court to the provincial authorities the plaintiffs opposed it. The motion was dismissed pro forma upon

an undertaking to facilitate an immediate appeal. No appeal, however, was taken, and so the matter rests.

In the discussion which has followed each step in these unusual proceedings some confusion has been caused by those supporting the provincial authorities in the press, and elsewhere, laying an undue emphasis on cases such as *Florence Mining Co.* v. *Cobalt Lake Mining Co.*, 18 O.L.R. 275, 43 O.L.R. 474. These cases emphatically expound the doctrine of the plenary nature of provincial powers in respect of matters within the jursdiction of the Provincial Legislature. We venture to suggest that the true basis of the law may be found in the principle that no injunction lies against the Crown because such an injunction cannot be enforced, and because the Crown cannot be asked through its courts to restrain itself.

In *Attorney-General for Ontario* v. *Toronto Junction Recreation Club*, 8 O.L.R. 441, the defendants moved before Anglin, J., for an interlocutory injunction restraining the plaintiff from recommending to the Lieutenant-Governor in Council that an order be passed cancelling their charter. The injunction was refused. Anglin, J., at page 444 says:—"That the court has not jurisdiction at the suit of a subject to command or to restrain the Crown or its officers acting as its agents or servants or discharging discretionary functions committed to them by the Sovereign, is established by many authorities, of which, as one of the most recent, I may refer to *The Queen* v. *Secretary of State for War* (1891), 2 Q.B. 326-334, 338," and further "no precedent has been cited for the granting of such an injunction on the application of a subject defendant, though many suits affecting rights of the Crown have been maintained by Attorneys-General in England and her colonies. Such actions are in fact the suits of His Majesty, instituted by his law officer, the Attorney-General, and it is not therefore surprising that the research of the learned counsel for the defendants has unearthed no instance of any such anomalous order as that which he now asks, by which His Majesty, through the instrumentality of this Court, would restrain himself in the exercise of the functions of his Executive Government. Cockburn, C.J., says 'this court cannot claim even in appearance to have any power to command

the Crown, the thing is out of the question.' *The Queen* v. *Lords Commissioner of the Treasury* (1872), L.R. 7 Q.B. 387, 394."

In *Church* v. *Middlemiss* (1877), 21 L.C. Jurist 319, Taschereau, J., late Chief Justice of Canada, says at p. 322: "He forgets that the acts of the Lieutenant-Governor in Council are His Majesty's acts, that if he suffers grievances in consequence of these acts, he can, by petition of right, complain and ask redress of Her Majesty, and her alone. The members of the Executive Council can be dismissed by Her Majesty or her Lieutenant-Governor in her lieu and stead. The House of Representatives can express its disapproval of their stewardship and oust them from power. But they are not in law individually and personally responsible towards any one of Her Majesty's subjects in the Province for any of their acts as advisers of the Crown; they cannot be called to account before a court of justice for the advice given by them, and each of them to the Sovereign in Her Councils. Their acts are not their personal acts. The Crown acts by them, and their acts are those of the Crown."

See also *The Eastern Trust Company* v. *Mackenzie, Mann & Co.*, 22 D.L.R. 410, and *In re the Massey Mfg. Co.*, 13 A.R. 446, which latter case merely deals with enjoining a statutory persona designata.

The judgment of the Appellate Division in *Electric Development Co. of Ontario* v. *Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario*, 34 D.L.R. 92, is very helpful for a proper understanding of the point at issue.

The Judical Committee of the Privy Council, 47 D.L.R. 10, set aside this judgment on the ground that the questions involved were of too great importance for the action to be dismissed before trial on a summary order, but the judgment nevertheless embodies the opnion of the Appellate Division as to the law at page 389, where it is said: "The argument is that this court is entitled and bound to make a declaration which shall tie the hands of the Executive of this Province and define exactly the limits within which it can act. The practical results of such an experiment would be rather perplexing. If the Executive chose to disregard the judgment of the court, how

would it be enforced? If the Lieutenant-Governor wished to conform and his Ministers refused, is he to dismiss them? If, on the other hand, the Executve obeyed the declaration of the court, if that were in the plaintiff's favour, it would run counter to a statute which recites the public necessity for its enactments, and empowers the government, i.e., the Lieutenant-Governor in Council, to carry out its provisions. . . . It looks to us as if the appellants were desirous of inducing the court to give advice to the Lieutenant-Governor in Council without waiting to be asked for it, a course which would, we think, astonish most students of constitutional law, and would completely ignore the relation implied by the enactment of the Constitutional Questions Act, R.S.O. 1914, ch. 85.

The argument which we have suggested above as being available to the provincial authorities in these proceedings does not ignore the finding in *Dyson* v. *Attorney-General* (1911), 1 K.B. 410, which was that the Attorney-General of England may be made a party defendant to an action for the purpose of obtaining a declaratory judgment without proceeding by Petition of Right. There is also a distinction between obtaining a declaration as to the rights of the Crown with respect to matters in dispute, and directing against it an injunction which cannot be enforced if disobeyed.

The possibility of a Legislature usurping its powers and collecting illegal revenue is of course a danger, but a much greater menace is the prospect of a judge granting an injunction which stays the operation of an Act of the Legislature or of Parliament on the mere allegation of its unconstitutionality and without even considering whether the allegation is well or ill founded. On the mere allegation that the Act taxing the winners' money in the possession of the Ontario Jockey Club (an apparently direct tax and therefore within the jurisdicton of the Ontario Legislature) was ultra vires, and without following the provisions of the Judicature Act, s. 33, an injunction was issued restraining the Provincial Treasurer from exercising the power given him by the Corporations Tax Act in collecting such tax and ordering the payment of the tax into court. No similar order has ever been made in England or in Canada, and it is sui generis.

The learned judge (Middleton, J.) in his judgment did not refer to any cases, and indeed he could have referred to none, although many cases besides those already referred to, both in England and here, could be cited against enjoining the Crown or its Ministers or servants. The injunction, in effect, orders Crown taxes to be paid into court and enjoins a Minister of the Crown from exercising powers given to him by Act of the Legislature, although no one has even suggested that the granting of such powers was beyond the capacity of the Legislature.

In the improbable supposition that some court will eventually determine that a tax upon winning bettors' money is indirect taxation, the bettors will receive no relief because the money is not collectable by suit from the Ontario Jockey Club or from anyone else, and the amounts claimed by each bettor are so small and the evidence in support of each claim so vague that no practical relief was afforded by the injunction. The learned judge in his judgment declined to determine the constitutional validity of the taxing statute, or his jurisdiction to enjoin a Minister or an officer of the Crown, nor did he apparently realize the practical futility of the injunction. He merely granted the order. On this theory the operation of any Act of Parliament or of a Legislature could be postponed indefinitely on the mere allegation that such Act is unconstitutional, e.g., the Judicature Act, on the ground that the Master of Chambers exercised the functions of a Superior Court Judge and therefore should be appointed by the Governor-General and not by the Lieutenant-Governor; the Surrogate Courts Act, on the ground that the Surrogate Judge should be appointed by the Governor-General and not by the Lieutenant-Governor; the Police Magistrates Act, on similar grounds; the Law Stamps Act, on the ground that it is indirect taxation; the Ontario Railway and Municipal Board Act, on the ground that the Board should be appointed by the Governor-General; the Municipal Act, on the ground that the provisions of many of its by-laws infringe the criminal law, and so on ad infinitum.

In the field of Dominion legislation the Criminal Code might be attacked on the ground that many of its provisions interfere with property and civil rights, which subjects are excluded

from Dominion jurisdiction; the Dominion Companies Act and the Dominion Trust Companies Act, on the ground that they infringe on Provincial jurisdiction; the Customs Act, on the ground that it imposes taxes upon the Provinces contrary to the British North America Act, 1867, and so on. Only a few of the Acts which might be "held up" are mentioned here, but every one of them could be attacked on the allegation that it is unconstitutional, and according to the doctrine expressed by Mr. Justice Middleton in granting his injunction order, the judge should not even consider whether such allegation is correct.

The injunction order was so extraordinary and has resulted in so much criticism of its action that one can scarcely regret that in this case the Ontario Legislature asserted the principle that irresponsible government by injunction did not meet with its approval.

ACCIDENT INSURANCE.

The case of *Sowards* v. *London Guarantee and Accident Co.*, 21 O.W.N. 456, has attracted the attention of the public, and has been commented on in the public press, because of its great interest to the owners of motor cars, and not the less in these days when accidents and collisions are of daily occurrence.

In this case no new principle of law is enunciated; and though all intelligent business men knew that one cannot insure against the consequences of one's own illegal act, they did not, perhaps, emphasize that thought when endeavouring to secure application for insurance. It has, therefore, been a surprise to many motor car drivers to learn that if they become involved in an accident, which is found to be the result of their own negligence, they may not recover upon their insurance policies.

In *Sowards* v. *London Guarantee and Accident Co.* the plaintiff brought his action upon a policy insuring him in respect of damage to his motor car. One of the defences set up was the illegal speed at which the car was running at the time the damage was sustained. Upon this defence, as upon another defence, also set up, the defendant company was successful. Riddell, J., held that the policy must be read as though it had expressly

provided that it was not to apply to accidents at illegal speed.

A defence of this nature by insurance companies was foreshadowed by *O'Hearn* v. *Yorkshire Insurance Co.*, 64 D.L.R. 437, and 67 D.L.R. In this latter case the plaintiff had struck and injured a pedestrian, who died of his injuries. The plaintiff was sued, and judgment was recovered against him. He was also convicted under section 285 of the Criminal Code. (Injuring persons by furious driving.) He was drunk and was driving at the rate of about forty miles an hour when the accident happened. He sued upon his policy of insurance. The company contested the claim on the ground that it was contrary to public policy that the plaintiff be indemnified against his own criminal act. The company was successful both at the trial and upon appeal.

In the O'Hearn case the plaintiff had been found guilty of an actually criminal act, and it was not surprising that the insurance company should contest the claim. After that decision the idea of an insurance company setting up a similar defence to claims arising from an ordinary accident occurred to the minds of several solicitors, but as a matter of practical business policy it was thought unlikely that anyone would take this decisive step. However, the Rubicon was crossed in *Sowards* v. *London Guarantee and Accident Co.* As a result the insuring public knows that payment of claims under the public liability and property damage clauses of automobile nsurance policies is an uncertainty depending perhaps on the grace of the insurance company. When a motor car owner insures against "public liability" he insures against having to pay damages to a person whom he has personally injured. If he has injured such person without negligence on his own part, he is immune from judgment and needs no insurance. If he injures such person because of negligent driving, he is guilty of an illegal act, and may find it set up against him when he seeks to recover upon his policy.

Insurance men when confronted with the result of this case will be furnished with some food for thought, and may find it necessary, when endeavouring to secure business, to emphasize the argument that their companies are not desirous of taking advantage of this case.

CONSTITUTIONAL LAW—PREROGATIVES OF THE CROWN.

Questions arise occasionally on this subject which reveal things hard to be understood and misty and confusing in their character. The last one that we know of is to be found in the *Law Times* (*Re H. J. Webb* v. *The Smithfield London*, reported at p. 295 of vol. 153, and referred to on page 319). It is not to the fact and findings of that case that we desire to refer but rather to the comments of our contemporary on the condition of the law as to Crown prerogatives.

The Master of the Rolls in giving judgment held that the Crown had no claim to priority by virtue of its prerogative in that case, which, however, unconsciously revealed the constitutional position (we quote from our contemporary) "on which Professor Dicey laid stress. 'The whole province,' wrote Professor Dicey, 'of so-called constitutional law is a sort of maze in which the wanderer is perplexed by unreality (by what if I might venture to do so, I would call "shams") by antiquarianism and by conventionalism.' Professor Dicey insists that the true scope and character of constitutional law are concealed by the hopeless confusion both of language and of thought introduced into the whole subject from the habit of applying old and inapplicable terms to new institutions, and especially of ascribing in words to a modern and constitutional king the whole, and perhaps more than the whole, of the powers actually possessed and exercised by William the Conqueror. The Master of the Rolls said that 'he thought that the expression debt due to the Crown was an unfortunate one, for it suggested the exercise of the prerogative in circumstances long passed away. It suggested the right of the Sovereign to be paid for his own use or for the public use as determined by him sums due to him to the exclusion of the rights of his subjects. At the present time, when the Departments included under the expression the Crown, or some of them, had become, especially during the war, great trading corporations, the prerogative had to be exercised in quite different circumstances and in respect of quite different subject-matter. Again, the payment in priority of a debt due to the Crown was not now a payment to the Sovereign for his own or

public purposes to the exclusion of his subjects, but a payment for the benefit of the general body of the taxpayers at the expense of those who were creditors of the insolvent company. The argument, therefore, proceeded in an artificial atmosphere, bearing little if any relation to the actual circumstances.' The prerogatives of the Crown have, in the words of Professor Dicey, become 'the privileges of the people.' They have been transferred in practice from the Sovereign to the Cabinet by whose advice the Sovereign exercises them in accordance with the wants and wishes of the people."

LAW OF DIVORCE IN CANADA.

By C. S. McKee, of the Toronto Bar.

(*Continued from May issue*).

A few people are opposed, so far as their own use is concerned, to the principle of divorce on any grounds. The unreasonableness of their opposition to the availability of divorce to those sharing other views was well pointed out before the British Commission in 1912, by Rev. W. P. Paterson, Professor of Divinity at Edinburgh University, who said that while the ideal of divorce only for adultery, which Christ set up is binding upon members of His Kingdom, it ought not to be imposed by force upon a mixed society, including many who are non-Christian, or only nominally Christians, and that the duty of the State in relation to dissolution of marriage is not to make the Christian ideal compulsory, but to make provision for the relief of those who suffer injustice in marriage, and so far as this shall be compatible with the general interests of society. Others in Canada are willing to recognise divorce on the grounds already adopted; but, whenever new grounds are advocated, a storm of protest is raised, generally on the theory that to admit other grounds is going to make divorce too easy to obtain, and thereby ruin the morality of the country. The utter absurdity of such a doctrine should be apparent to any one who will but reflect that there are several grounds in addition to those already adopted which in fact put an end to married life—not merely to happy married life, but to any married life at all—while in law as distinct from fact, the married life is regarded as continuing. There are cases in which the state, having regard to the requirements and practical circumstances of life and

the nature of marriage as a contractual relationship, is obliged to grant the severance of a bond the moral foundations of which have been destroyed. Complex and changing conditions make recognition of new grounds imperative.

This was brought to the attention of the British public by the press in the summer of 1919. A well-known member of the British House of Commons and his wife found that for them to live together was impossible; the wife had committed no act of adultery, nor did either party wish their good name to be dragged through the mud; the husband registered at a well-known hotel with a woman of low character, and occupied the same room with her; this was used as evidence of adultery, and the desired divorce obtained. After the decree had been granted, the husband informed the public through the newspapers that as a matter of fact, although he had spent the night in the same room as the co-respondent, no adultery had been committed. In order that a highly desirable divorce might be obtained, it had been necessary for the man to appear in the roll of a moral delinquent.

The first reform throughout Canada should be to place women on the same footing as men; to make adultery alone on the part of the husband sufficient ground for a divorce by the wife. The inequality which at present exists in Provinces following the English Divorce Act has its origin in a past age when immorality on the part of men was looked upon as less serious than on the part of woman, this theory in turn being based on the belief that the man committing adultery would likely do so with a woman of loose character and under conditions which would be unlikely to produce children and thereby affect inheritance, etc., while in the case of the few wives who might err, the circumstances would in very many cases be just the opposite. As a matter of fact, there is in all probability in the vast majority of cases of adultery by either party leading to a divorce little likelihood of the production of children; while in very many cases of the offence by the husband, the possibilities of him contracting and communicating to his wife venereal disease are great. The reason more true to fact for admitting adultery as a ground for divorce to either party is that it strikes at the inmost privacy of married life, at the stability of the home, and at the happiness of the parties concerned—and to woman with her more sensitive nature and finer feelings, the idea would in most cases be far more loathsome than to man,

and her future happiness far more prejudiced. Before the Ecclesiastical Courts the sexes had been on an equality; the inequality had its origin in divorce by Private Acts—passed by a Parliament of men. The equality of the sexes on this question is recognised throughout the United States, and was strongly recommended by both the majority and the minority reports of the British Commission of 1912.

Wilful desertion without the consent or against the will of the other party and without reasonable cause for two years and upwards is a ground for a sentence of judicial separation. Clearly such an offence in many cases breaks up a home more than, for example, a single act of adultery; and, in fact, if the subject could be investigated, it is only reasonable to suppose that adultery generally will be committed by the deserting party. In the case of the poorer classes, the circumstances following desertion are often particularly pitiful—a woman may be left with no means of support for herself and family, or a man may be left with no one to look after his home and his children. If divorce were allowed as suggested, re-marriage and possibly happiness would be a possibility. It was recommended by the British Commission that the period should be 3 years; but 2 years has been found to be a just period in cases of separation, and in view of modern means of rapid travel and communication, and of the possibility of distress already referred to, there would appear to be no satisfactory reason for not adopting the 2 year period. This is the period recommended by the American Report.

Cruelty is another of those grounds which in fact put an end to the married life, and should be recognised by law as doing so. "Cruelty is such conduct by one married person to the other party to the marriage as makes it unsafe having regard to risk of life and limb or health, bodily or mental, for the latter to continue to live with the former." (British Commission of 1912.) It should include the communication of venereal disease knowingly or negligently, and also cases where husbands compel their wives to become prostitutes for their husband's maintenance. This course in regard to venereal disease practically has been adopted by the Senate of Canada, as already noted in connection with proof of adultery.

Insanity pronounced as incurable by competent medical authority, should also be recognised as a ground for divorce. This disease differs from most others in that the person suffering

from it has to be put under confinement and is rendered unable to perform all duties connected with married life and domesticity. That a person should be kept linked for years to one who has the dreadful misfortune to be afflicted with this malady, and thereby never know or cease to know the happiness connected with a home and a family is unjust and unreasonable. When the insanity can be shown to have been brought about by the sexual perversions of the petitioner, the relief should not be granted. The theory of eugenics has not as yet behind it a sufficient volume of public opinion, nor is it sufficiently connected with the subject of this article to warrant examination here.

It might at first appear that the development of incurable impotency after the consummation of the marriage should be recognised as a ground for divorce. But it is apparent that there is a vast difference between a properly consummated and a non-consummated marriage, and between the situation in a home where impotency develops and one where desertion, cruelty, or insanity takes place. This question is one which would appear to require further investigation by medical authorities before it can be discussed fully from its legal side. The wilful development of impotency can easily be regarded as refusal to have sexual intercourse.

Habitual drunkenness was said by the British Commission of 1912 to produce as much if not more misery for the sober partner and the children than any other cause in the list of grave offences. The report goes on to say: "Such inebriety carries with it loss of interest in surroundings, loss of self respect, neglect of duty and personal cleanliness, neglect of children, violence, delusions of suspicion, a tendency to indecent behavior, and a general state which makes companionship impossible. This applies to both sexes; but in the case of a drunken husband, the physical pain of brute force is often added to the mental and moral injury he inflicts upon his wife; moreover by neglect of business and wanton expenditure, he has power to reduce himself and those dependent on him to penury. In the case of a drunken wife, neglect of home duties and of the care of the children, waste of means, pawning and selling possessions, and many attendant evils produce a most deplorable state of things. Should anything further be necessary to convince all that under such circumstances married life cannot exist, and that to continue it in law is an injustice. With habitual drunk-

enness should be classed habitual use of drugs. Divorce in all such cases should be granted only on the proof of failure of all reasonable attempts at cure—for a period recommended in England as 3 years, in the U.S.A. as two years.

The remarks made above in regard to insanity apply almost wholly to imprisonment; with the difference that where the imprisonment is not for life, there is a possibility of the resumption of married life. A life sentence should be made a ground for divorce. This is as far as the British Commission were prepared to go; the U.S.A. report recommends the same in regard to a sentence of 2 years or more; other countries, as noted above, adopt various periods. Cases of poverty urge the adoption of a short period; but when it is remembered that the state has various provisions for assisting the poor, and that the imprisonment is not "incurable," the adoption of a longer period than 2 years would seem desirable—probably 10 years and over. Recurrent imprisonment amounting to this period also should be a ground.

Refusal without reasonable ground to permit of sexual intercourse where there has been no intercourse as already recommended should be made a ground for annulment; if there has been no sexual intercourse, the refusal should after the lapse of 2 years be treated as wilful desertion.

Although not strictly a question of divorce, the question of presumption of death is so closely akin that the matter may be noticed in passing. The law on the subject is found in R.S. C., ch. 146, sec. 307, sub-sec. 3 (b); if his wife or her husband has been continually absent for 7 years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those 7 years—under such circumstances going through a form of marriage does not amount to bigamy. Instead of leaving the law in the very unsatisfactory condition indicated by this section, it would seem much more reasonable—and particularly in view of modern means of communication—that after the lapse of the 7 year period, the other party was entitled to apply for an order of presumption of death and on obtaining such an order to re-marry. Such an order should also be obtainable within the 7 years on proof of definite circumstances leading to a reasonable presumption of death.

All the above reforms in regard to the grounds for divorce were recommended in England as long ago as 1912; they are

all either recognised or recommended in the United States. Lord Gorell, the chairman of the Commission of 1912, introduced a bill in the House of Lords in 1914 embodying many of the recommendations of the report, but the bill was not adopted. The argument that by increasing the grounds, the number of divorces will be automatically increased, and that knowledge of the possibility of divorce will cause an increase in the offences thereby completing a vicious circle, will not stand examination for one moment. In the United States in States with numerous grounds for divorce, the increase in proportion to the population has been slight or there has been even a decrease (Connecticut); while in other States, having few causes, there has been a considerable proportional increase. (British Report, p. 26). In no case has the granting of a divorce to the guilty party been suggested, and to say that there will be collusion to the extent of a man rendering himself a permanently incurable lunatic, drunkard, or convict is absurd. In cases of desertion and cruelty the absence of collusion in most cases far outweigh the possibility of collusion in a very few; as in cases of adultery, the inability of a Court to get to the bottom of the situation and discover the real facts should not be presumed. The grounds advocated put an end to married life in fact, and in every case are recognised as grounds for a judicial separation, that form of existence which as a permanent remedy for such evils is outrageous, being as it is an existence where one is neither married nor single, where one is married in law and not in fact, where in many cases adultery and illegitimacy are almost natural consequences; an existence of which the Honorable Henry B. Brown, a former Justice of the United States Supreme Court, said in an address before the Maryland State Bar Ass'n.: "A situation more provocative of temptation and scandal cannot be imagined. For the former relation is substituted a marriage which is not a marriage—a celibacy, an amphibious existence which places the strongest instincts of our nature under a ban and deprives both parties not only of the companionship of the other sex, but of the comforts of a home life. A legal separation is, in fact, a punishment rather than a remedy." (British Report, p. 92). In 1917 an effort was made in England to have a separation of 3 years convertible in to a divorce; the effort had the support of the Law Quarterly Review edited by Sir Frederick Pollock. After years and years of effort, such a provision has been adopted in France. Divorce in the cases re-

commended would not be a degradation of the sanctity of the marriage tie—that in each case has already occurred. The commission of a wrong cannot be prevented by denying redress to the injured party—divorce is not a disease, but a remedy for a disease.

6. Defences in Divorce Cases.

The defences to an application for divorce or the grounds for its rejection are practically the same throughout the British Empire and the United States. Those recognised at Ottawa are: 1. Denial of facts alleged. 2. Connivance. 3. Condonation. 4. Collusion. 5. Recrimination. 6. No or void marriage. 7. *Non compos mentis* at the time of commission of the act of adultery. 8. Delay. 9. Cruelty, desertion, or wilful separation without excuse before the alleged adultery, or wilful neglect or misconduct which has conduced to the adultery complained of.

Connivance is the consent or indifference of the applicant to the commission of the acts constituting the cause of divorce. It occurs before the misconduct.

Condonation is forgiveness, either express or implied, of a matrimonial offence constituting the cause of divorce. It occurs after the misconduct. The mere resumption of sexual intercourse is not absolutely conclusive as implied condonation by a wife. If the condonation is on the condition that no further offence occurs, and there is a repetition such repetition nullifies the condonation.

Collusion is an agreement between the parties that one of them shall commit or appear to have committed acts constituting a cause of divorce, or that facts shall be suppressed, or that no defence shall be entered, for the purpose of enabling the other to obtain a divorce. The practice in regard to this subject appears to be a little too strict. There would appear to be no injustice in the parties agreeing as to the conduct of the application if such an agreement is honestly and properly made, in a suit in which there is previously an adequate and good ground for divorce. The Senate has adopted the practice of admitting in evidence affidavits of the guilty party admitting the facts complained of provided the absence of collusion is amply proved by other evidence.

Recrimination is a showing by the defendant that the plaintiff has committed an act which is a cause of divorce. Adultery is the most frequent example at present. The practice is to re-

ject evidence of adultery by the petitioner if it occurred after the adultery complained of in the application. Generally the adultery of the petitioner although long passed and condoned is a bar to divorce. In Scotland, the petitioner's guilt was no bar, and it is doubtful if the guilt of both is not a greater reason for sundering the tie than the guilt of one. Lord Daysart in his evidence before the British Royal Commission stated that he often felt that in intervening as King's Proctor to have the applications refused on the ground of the petitioner's adultery, he was doing more harm than good. On the other side, that the applicant must come with clean hands is an old principal of British justice, and one which acts as a check on immorality. The only reform which suggests itself is to leave the check, but to give the Court discretion as to its use according to the circumstances of the case and the petitioner's conduct. The respondents' counterclaim of adultery on the part of the petitioner is useless:

(a) Where the adultery is committed in ignorance of the fact—as where the respondent is believed to be dead;
(b) Or in ignorance of law—as where a party bona-fide believed that a decree nisi dissolved the marriage. (Query this.)
(c) Where the adultery is committed in consequence of the violence and threats of the husband.

Delay pleaded on the part of the respondent may be answered by want of means on the part of the petitioner.

In addition to the above defences, in Provinces where the English Act is followed, under sec. 32, the Court has power to suspend a decree until some provision is made for a wife divorced.

7. Procedure.

As the purpose of this article is to discuss rather the general principles of divorce in Canada than the minute details in regard to practice before the various Provincial Courts, many of which details are those common to all litigation rather than peculiarly the divorce proceedings, only a few points in regard to such practice will be noted in passing.

In the East, the proceedings are commenced by a petition which corresponds to the Writ of Summons in other actions. In Saskatchewan some of the earlier proceedings were commenced by petition and others by writ, but now they are all commenced by writ in the ordinary way. Other pleadings

in the form of defence and reply follow this, and have to be served and filed in the usual way. In all litigation it is very desirable to keep the pleadings as simple as possible as regards form, and there would appear to be no reason why a petition should be substituted for the ordinary writ of summons endorsed with a statement of the facts. A practice complained of in England before the Royal Commission of 1912 was that of making in the petition some specific charge of adultery, and then concluding with a general charge of adultery between the parties. The result was a continuous application for particulars which when given amounted to fresh charges of adultery. The Commission recommended (p. 134) that every charge should be specific with sufficient detail to give adequate notice to the other party. This recommendation seems most reasonable and one which might well be adopted in Canada. In the Provinces where English procedure is followed, an adulterer or adulteress must be made a co-respondent. In order that a person may have the chance to deny accusations on his or her good name —accusations which may be false—it would appear to be reasonable that where such co-respondents are known—as distinct, for example, from cases where the evidence is merely that the respondent visited a brothel—service on them should be effected, personal where possible, and in other cases substitutional, barring only substitutional service by advertisement.

As already noted, in most of the Provinces either party may apply for a jury to decide a question of facts. By some it has been suggested that trial of divorce cases by jury should be abolished; the right does not exist in Scotland, and exists in but very few of the United States of America; juries know little of any class of life except their own, and are apt to take an extravagant view of such things as cruelty. However unsavoury may be the nature of the evidence, it remains a fundamental principal of British justice that a man should have the right to be tried by his peers, especially so in divorce cases where the great mass of the work is the settlement of pure issues of fact—e.g., whether there has been adultery, desertion, etc.—and where difficult questions of law, as for instance those which depend on some branch of International Law or the extent of the Court's jurisdiction come up for decision very rarely; and it would seem but just that this right in regard to divorce cases should exist. That it would be in-

frequently used is suggested by the figures of the British Divorce Court of 1910-which one would presume may be taken as fairly representative:—Total number of cases heard 627, undefended 500, defended 127, tried by Judge alone 567, tried by Judge and jury 60.

The fact that the petitioner is not bound in most cases to answer questions which would admit adultery has been criticised. If the suggestions made in the last two chapters in regard to offences by the applicant are sound, this point ceases to be of importance.

The usual regulations in regard to the form of evidence and the compelling attendance of witnesses apply.

In regard to collusion and connivance, the practice appears to be for the applicant to satisfy the Court that these have not occurred by a mere declaration to that effect. It is most desirable that every possible check should be put on this phase of the matter, as otherwise the result would amount to divorces almost at will. The Courts should be given the very freest possible hand to adjourn the hearing until any suspicious circumstances can be fully investigated by the Crown authorities. One of the fundamental ideas in connection with divorce is that if one of the parties to a marriage commits any of the offences already referred to in the face of the opposition and dislike of the other party, a divorce should be the relief of the latter if so desired. Unless this happens the parties must make the best they can of life, so that the homes broken up may be kept to a minimum—so that divorce may not become a cause of separation and infidelity, but may continue to be a relief therefrom. If the offence is committed with the sanction of the other party merely for the purpose that a union regarded as undesirable for reasons less fundamental than those suggested as grounds for divorce, such for example as incompatibility of temper, not amounting to absolute cruelty, the parties should not be freed from such a union. Although it is a question not capable of positive proof, it would appear that where the offences are committed with collusion or connivance, in most cases, which are as a matter of fact those of adultery, the guilty party will be prepared to go to the same lengths (i.e., to commit adultery) without such collusion or connivance. In England the annual average of decrees nisi for the period 1906 to 1910, was 639; The King's Proctor interfered in 26 cases, and 23 decrees were reversed.

In Provinces following English procedure, the practice is to grant a decree nisi, not to be made absolute until after the expiration of 6 months, during which time the Crown may intervene to shew collusion, etc.

In the case of the 3 Maritime Provinces and British Columbia, there appears to be no right to appeal beyond the Supreme Court of the Province. In the Prairie Provinces appeals may be carried to the Privy Council. The latter arrangement—so long as the Privy Council continues to be the Court of last resort for Canada—would appear to be desirable, on the basis that questions of divorce are surely of as great an importance as questions involving merely comparatively large sums of money. As a matter of practice, the very nature of the cases will in almost every instance of a decree granted check the parties from going on with an appeal; as by the time their private affairs have been given the publicity of one Court, the parties will have become so estranged as to make them not desirous of continuing the marriage union.

Poor applicants and respondents may proceed in *forma pauperis*, the conditions for which should be twofold: 1st, a *prima facie* case; and secondly insufficiency of means. As the wife is very often dependent on her husband for means, and as he is bound to supply her with necessaries of life—of which divorce, as distinct from an action say for damages or on a contract, may be one—the rules in regard to him providing her with the necessary funds to prosecute or defend her case have been made similar to the rules in alimony actions. Whether innocent or guilty, she is nearly always allowed a certain amounts of costs, for which the husband is primarily liable, unless she is shewn to have separate estate. Where the wife succeeds, she gets her costs as a matter of course; where she fails, she gets such amount as the Court allows.

In view of the criticism which follows it is proposed to examine in some detail the procedure to secure a parliamentary divorce. This is governed by Senate Rules 133 to 152.

The first thing to do is to be sure that the grounds exist, that there is no sustainable defence, and that the case comes within the now usually recognised jurisdiction of Parliament, that there has been no connivance, condonation, or collusion, and that there is sufficient time as detailed hereafter. As already noticed, Parliament has jurisdiction to grant a divorce to a party domiciled in any part of Canada; but, with the

exception of a single case from each Province of B.C.. and P.E.I., the practice has been to apply to Parliament only in cases where the domicile is in a Province not having a Court of recognised jurisdiction.

Having established these matters, the next step is to start the necessary advertisement. A notice of application must be published once a week for 14 weeks in the Canada Gazette and in two newspapers published in the district (Quebec) or in the County (Ontario) wherein the applicant usually resided at the time of the separation of the parties. The flaw in this regulation is that parties residing in large cities can publish their notice in any paper in the county instead of being required to publish it in a city paper. As a result, in the case, e.g., of Toronto, divorce applications instead of being published in the city papers at about 6 dollars an insertion, are published in country journals at about 10 dollars for the whole fourteen insertions, and the parties to whom the notice is intended to be given never know of its existence. Notices in the Province of Quebec must be published in one English and in one French paper; if two such papers are not published in the district, they have to be published in one newspaper in both languages. A copy of each issue of the newspaper is required before the committee at Ottawa, and should therefore be obtained while the advertising is in progress. The publication must be between the close of a session and the consideration of the petition; if it is not completed in time to allow the petition to be considered during the session for which notice is given, the Senate does not require any fresh publication; to comply with the regulations of the House of Commons governing private bills, the notice in such a case would have to be republished for two months. As it usually requires about 6 weeks to get a bill through both Houses, it is advisable to have the advertisement completed before the session commences. The form of notice is given in the pamphlet issued by the Senate, containing the rules on divorce.

After advertising has been commenced, the applicant should proceed to effect service on the respondent of: 1. A copy of the notice. 2. A copy of the petition to the Senate. 3. A statement of particulars.

The service must be made not less than 2 months before the consideration of the petition by the committee, and where possible, must be personal service. If all reasonable attempts

at personal service fail, and the applicant makes all reasonable attempts to bring such notice, petition, and particulars to the knowledge of the respondent, the committee will regard the service as sufficient. Copies should be mailed or delivered to the respondent's last known address, and to anyone likely to be in communication with the respondent, such as a relative, agent, or solicitor. The form is given in the above mentioned pamphlet.

Service, when made in Canada, is verified by a declaration of service as set out in the pamphlet.

When the service has been effected in a foreign country, the proof must be by affidavit instead of by declaration, the form complying with the law of the country where made. If made before a notary public and certified by his seal, it is generally sufficient. The committee before proceeding with a petition may order substitutional service in some manner different to what has been carried out.

After service has been effected, the following documents should be forwarded to the agents in Ottawa of the applicant's solicitor:

1. Declaration of service with exhibits.
2. Petition to House of Commons—"To the Honourable the House of Commons of Canada in Parliament assembled"—and then follows form of petition to the Senate.
3. Petition to the Governor General . . . "To . . . (put in full name and titles) . . ." . . and then follows form of petition to the Senate.
4. Copy of 1 for agent's file.

The Ottawa agent, when the session opens, will give the documents to a Senator and Member of the House of Commons for presentation.

The rules provide that petitions must be presented to the Senate during the first 60 days of the session, but the time for receiving them is often extended. They must be presented to the House of Commons within the first six weeks of the session. No notice of the sitting of the committee is given except by posting in the lobby, but this is done in ample time to enable the parties concerned to be present.

When the petition is presented, it should be accompanied by proof of the following: 1. Publication in the newspapers

and the Gazette for 14 consecutive weeks—by declaration. 2. Service—as above.

Duplicates of the following documents should be given to the Clerk of the Senate Committee: 1. Duplicate petition to the Senate. 2. Declaration of service. 3. Declaration of publication. 4. Copies of the newspapers containing the advertisements. 5. Every document to be used as evidence before the Committee—such as marriage certificates, etc. 6. Fees—$210. If the petitioner is too poor to pay this, a petition should be presented asking for leave to proceed in *forma pauperis*.

The applicant, the respondent, and any other person affected may be heard by counsel; the latter wear their gowns. Besides counsel, the services of a parliamentary solicitor are most essential to see the bill safely through the Committee and through each of its three readings before each House, and that it receives the Royal assent. Evidence is upon oath, and witnesses may if necessary be summoned under the hand and seal of the Speaker of the Senate—and on payment of proper expenses. Proof is required before the Committee of the following:—

1. A valid marriage including identity of the parties—usually by marriage register, copy of entry in register, certificate of Registrar-General in Ontario and of custodian of register of marriages, etc., in Quebec, or by personal proof of cohabitation.
2. Domicile.
3. Adultery, etc.—It is not necessary to prove the direct fact of adultery; in nearly every case the fact is inferred from the proof of circumstances which shew the opportunity for the act, and which led to the conclusion that it occurred—e.g., registering as man and wife and spending the night in the same room at a hotel, cohabitation, venereal disease, visit to a brothel, birth of an obviously illegitimate child. The evidence of a woman of loose character with whom the adulterer is said to have been committed will be very closely scrutinized, also the evidence of a husband or wife alone, unless corroborated by another witness or by strong circumstantial evidence.
4. Lack of condonation, collusion, and connivance—this in most cases is done by the applicant simply making the statement that there has been none, a system obviously

open to all the defects already referred to in connection with applications before Courts of law.

Copies of the evidence are distributed to the Senators, Members of the House of Commons, the parties, and their counsel.

The Committee may drop the application, recommend against it, or recommend in favour of it, or adjourn for further evidence to be produced. If recommended favourably, the report of the Committee to the Senate is accompanied by a draft bill.

The cost of a parliamentary divorce may be summarised as follows: 1. Advertising in two papers—$16 to $175. 2. Advertising in Gazette—$20 to $40. 3. Senate fees—$210. 4. Solicitor's fees and disbursements. 5. Agent's fees and disbursements. 6. Witnesses' fees and disbursements. 7. Counsel's fees and disbursements.

8. Parliamentary or Judicial Divorce? . .

Now that both jurisdiction and procedure have been examined, it seems meet to consider the advisability of abolishing parliamentary divorce, and of substituting therefor throughout the Dominion, a uniform system of divorce jurisdiction.

Attempts have been made in 1858, 1859, 1860, 1870, 1875, 1888, 1919 and 1920, at least, to abolish parliamentary divorce; but in each case the effort has met with failure, due largely to the opposition of Roman Catholics, partly to the opposition of many non-Catholics, and partly to the general bad luck which may attach itself to any bill in its varied course, through a Parliament run on strictly party lines and where time is limited.

The advantages of divorce by the judgment of a Court of law over divorce by an Act of Parliament are numerous. Although not a positive proof of advantage, it may be noted in passing that in every country in the world where divorce is recognised except Ontario, Quebec and Ireland, the jurisdiction lies in the Courts of the land. The prevalence of Roman Catholics in Quebec and Ireland accounts for the situation there, as it does also in Italy and Spain where no divorce is recognized, separation only being allowed; these are granted by Courts of law and not by a Parliament.

Expense to the public in regard to justice should never be a fundamental consideration; but where other things are equal, it may well be considered. Under the Parliamentary system divorces are tried by nine Senators each drawing $4000 a session,

and practically all of whose time is taken up with the work of the Committee. Divorces could be tried by a single Judge, assisted in some cases by a jury. In Ontario a Supreme Court Judge receives $9000 a year. Moreover, these Senators are sent to Ottawa presumably to deal with matters affecting the country as a whole—not the troubles of individuals. Their business should be affairs of state. The above figures do not take into account the cost of having the bill before each House 3 times, with the Members of Parliament each drawing $4000 a session and always pressed for time.

In the next place there is from the decision of Parliament no appeal. True another petition supported by fresh evidence may be presented at a subsequent session; but on a finding on a question of law or fact, there is no appeal. The advantages of a system of appeal in judicial matters is too widely recognised in practice to warrant further discussion here.

The chairman of the Senate Committee on Divorce is always a lawyer; usually 3 or 4 of the other members are lawyers; another 3 or 4 are doctors; and the remainder are anything. Could a body less suited for the trial of such actions be imagined, especially as the capability and certainly the training of the chairman to act in the advisory capacity of a Judge may often be questioned? The body can not be likened to a jury, nor will it be so regarded by many applicants or respondents; the Senators are not the peers of many of the parties who come before them. The poor man who goes before a Court and asks for a jury feels that he will have the opinion of men much in his own station in life; if he does not ask for a jury, he relies on the legal training of the Judge. On the occasion of the second reading of the bill introduced by Mr. Nickle (Kingston) in 1920, providing for the establishment of Divorce Courts, Mr. Steel, the Chairman of the Private Bills Committee said: ".....The greatest evil is that under the present system divorces can be obtained and are being obtained on evidence which....would not be accepted divorces granted during the present year which no Judge or lawyer entrusted with the examination of witnesses would have been disposed to grant for one moment." The Divorce Committee apparently recognises the necessity of making their proceedings resemble those before a Court of law—e.g., their examination of witnesses and insistence on proof of points of law—then surely the matters should be disposed of by a competent Court of law, instead of by a mere make-believe Court.

A great disadvantage of parliamentary divorce is the length of time it takes, due to the infrequency of the sittings and the necessity of advertising for 14 weeks. Some try to argue that this will prevent rash action; that it will provide time to repent and to reconsider. To this, the answer is that the possibility of reconciliation in divorce cases must from their very nature and from the publicity afforded to them by the necessary advertising be almost negligible. There is also the further and even more practical answer that in many cases this delay is an absolute hardship—the temperamental hardship of being tied to an undesirable union, and in the case of the poor of being unable to marry a desirable helpmate as soon as might otherwise be possible .

Probably the greatest disadvantage of the parliamentary system is the absolute disadvantage, amounting in many cases to prohibition, at which the poor are placed. It means the taking of counsel and witnesses long distances, their maintenance while attending in Ottawa, and the expenditure of $210 alone on parliamentary, and practically useless, printing. As stated by the British Commission in another connection, it is obviously unsatisfactory that, while Courts have been established in which the poor can sue and be sued in respect of small debts and torts and compensation for injuries, they should have no means of redress in these graver matters. The matters which are recognised as grounds for divorce are recognised as intolerable, and yet the remedy is placed beyond the reach of those who need to use it. The latter if too poor to invoke the assistance of Parliament must either take the law into their own hands and live immoral lives, or submit to hardships which the same Parliament has itself recognised as intolerable. It is argued that the poor can never be placed before the law in the same position as the rich! true poor people have to be content with less expensive litigation, generally in the way of counsel; but none the less the State should provide tribunals suitable to their means. This is done in respect of all litigation except divorce. Also the need of the poor for divorce is greater even than the rich. The latter have far more power than the former of mitigating the hardships and miseries consequent on the destruction of the home. The Registrar of the Supreme Court at Victoria gives as his estimate of the total costs in an undefended action before that Court $240; for Nova Scotia a similar estimate is made at $150; for New Brunswick, the estimate covers only Court costs, and is $30.

The criticisms offered of Divorce Courts are neither numerous nor sound. Senator Gowan in 1888 argued that Courts were bound strictly by precedent while Parliament was not. Parliament as a matter of fact recognises in a general way precedent, but the very fact that it is not bound to do so strictly is not an advantage but an absolute disadvantage—what the Committee has done one session is no positive assurance that if your case conforms it will be treated the same way the next session. Surely divorce is of equal importance with other matters of litigation. Or do the opponents of Divorce Courts wish to abolish from all Courts the recognition of the binding effect of precedents, and leave us to the whim of individuals?

The chief criticism of Courts has always lain hidden in the quite general feeling that divorce should be made or kept as difficult as possible—or since the question now under discussion does not involve the grounds for divorce but rather the accessibility of the jurisdiction once the grounds exist, it might be more accurate to say instead of as difficult as possible, accessible to as few as possible. It is said that it would militate against morality if the facilities for trying divorces were extended—that an increase in the number of divorces, even though the grounds are recognized as existing, would mean an increase in immorality. The findings after very careful consideration of the British Commission in 1912 (pp. 38 & 42) were quite to the contrary. Mr. Bishop in his authoritative work, Marriage, Divorce and Separation, says at pp. 21, 22, with reference to the period before 1857 in England: "....Indeed it is well known that in England, where divorces — — — have until lately been obtainable only on applicaton to Parliament, in rare instances and at an enormous expense, rendering them a luxury quite beyond the reach of the mass of the people, second marriages without divorce, and adulteries, and the birth of illegitimate children, are of every-day occurrence; while polygamy is in these circumstances winked at, though a felony on the statute book..... That wrongs whence come divorces are evils no one denies. If the refusal of divorce would prevent them all would pray for it. But the experience of every state and country withholding this redress is practically, however man may theorize, that no form of matrimonial delinquency is less prevalent there than elsewhere. And to the extent to which separations actually occur, the community is remitted back to the condition it would be in if marriage itself was abolished....." The example of the

United States is always pointed to in this connection as a dreadful warning as to the certain increase of immorality if facilities for the trial of divorces are adopted. The British Commission investigated this phase of the question most thoroughly, and had the great advantage of accessibility to evidence not available to the individual; and they found that in the case of the United States the high percentage of immorality of a type which is a ground for divorce was not due to the facilities for the latter, but to such things as the ease with which marriage can be entered into, immigration of people with different moral standards, facilities for travel, increase of luxury, a growing spirit of independence, and a resentment of restraint. To these the late E. F. B. Johnston, K.C., added the development of dense commercial centres, a restless and changing spirit, the substitution of business rush for home ideals, the desire to make money quickly, and the mode of living in hotels and rooms. It is even suggested that the increase is attributable in many cases to an appreciation of a higher moral standard. The opponents of Divorce Courts also appear to overlook the fact that right here in Canada there is the wonderful example of a Province (P.E.I.) with a Divorce Court, which owing to the high moral standard of the community has been in disuse for over 50 years. The existence of this Court has certainly not produced immorality. In Australia, New Zealand, and South Africa, Divorce Courts exist, and yet the people of these countries are not regarded generally as moral delinquents.

In a recent personal letter, a Regina barrister says: "We are somewhat deluged with divorce cases now, but I think that in very few of them the cause of action has arisen since the jurisdiction was established. In other words, all the old grievances are being dug up, and people who years ago would have obtained a Senatorial divorce but for the expense are now taking advantage of procedure in the Courts. When the arrears of divorce work are caught up, I do not think the number of divorce cases here will be startling at all. This is chiefly due to the attitude by the Judge of any Court in the land. I have seen several of our Judges, who are determined Saskatchewan will not be as notorious as Reno. Divorces here have by most of our Judges been granted with great care and only on grounds being most clearly established. Unless the Courts become more lax in granting divorces, I do not think it is going to be detrimental to social conditions here." If divorce is denied, the chances are all in-

favour of immorality increasing, of, for example, an unfaithful wife living in adultery and bearing illegitimate children, and the husband living with another woman of his choice; reconciliation is generally out of the question. In fact the argument that if Divorce Courts were created the number of divorces would increase is really one of the strongest arguments for these Courts. As the Hon. W. S. Fielding said in the House of Commons: "If thousands of honest men and women in this country are entitled to divorce, not on new grounds but on the well-established grounds recognised by the Courts and by this Parliament, the fact that these men and women are entitled to divorce and are unable to get it because of the present machinery is the strongest argument why that machinery should be discarded . . . " When the Roman Catholics oppose the extension of grounds for divorce or even the recognition of any grounds, they are, if mistaken in their judgment and in their appreciation of an actual situation as distinct from an antiquated religious teaching, at least sincere to their faith. When their wishes are over-ridden by a majority and divorce on certain grounds is actually recognised and they exert themselves to make application of the adopted principles as difficult as possible, they are playing the part of an undignified and unjust opposition. If they would confine their activities to endeavors to convince Canada that grounds for divorce should be abolished and to teach adherents of their own church that no matter what the facilities for divorce may be they should not take advantage of them, they would more nearly be conforming to the principles for which they profess to stand and would probably sooner see the error of their views and amend the same to meet current conditions. To argue that because in any country there are few divorces the morality of that country is high is a fallacy. Let it be shown that in spite of ample facilities for divorce there are few, and then it may be argued that high morals exist.

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As one of the very fundamental matters in the arguments both of these in favor and those opposed to divorce is the question of the children and their home life, the effect of the decree on them should be considered. Parliament has occasionally granted the petitioner the custody of the children.....e.g., the *Pitblade* case of 1905——, but the general view is that the custody of the children is one of civil rights, and therefore

properly within the jurisdiction of Provincial Legislatures and Provincial Courts. However, cases where there are special circumstances may receive special relief. The English Act s. 28) definitely provides that the Court shall have power to dispose of the custody of the children as it shall think fit. The practice is practically the same in both England and the U. S.A. The primary question is the interest of the child, and this is followed by the interest of the innocent party; if the child is very young it may be left temporarily in the custody of the mother, even though she is an adulteress; if neither party is fit, the custody of the children will usually be given to any proper person intervening, or the children will be placed in a suitable institution, with the right of access given to both parents; if nothing to the contrary is said in the decree, the father will be liable financially for the children; if application for divorce is dismissed, it is not the practice to make any order in regard to the custody of the children; in annulment cases, the decree may be withheld until provision is made for the children.

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favour of immorality increasing, of, for example, an unfaithful wife living in adultery and bearing illegitimate children, and the husband living with another woman of his choice; reconciliation is generally out of the question. In fact the argument that if Divorce Courts were created the number of divorces would increase is really one of the strongest arguments for these Courts. As the Hon. W. S. Fielding said in the House of Commons: "If thousands of honest men and women in this country are entitled to divorce, not on new grounds but on the well-established grounds recognised by the Courts and by this Parliament, the fact that these men and women are entitled to divorce and are unable to get it because of the present machinery is the strongest argument why that machinery should be discarded . . . " When the Roman Catholics oppose the extension of grounds for divorce or even the recognition of any grounds, they are, if mistaken in their judgment and in their appreciation of an actual situation as distinct from an antiquated religious teaching, at least sincere to their faith. When their wishes are over-ridden by a majority and divorce on certain grounds is actually recognised and they exert themselves to make application of the adopted principles as difficult as possible, they are playing the part of an undignified and unjust opposition. If they would confine their activities to endeavors to convince Canada that grounds for divorce should be abolished and to teach adherents of their own church that no matter what the facilities for divorce may be they should not take advantage of them, they would more nearly be conforming to the principles for which they profess to stand and would probably sooner see the error of their views and amend the same to meet current conditions. To argue that because in any country there are few divorces the morality of that country is high is a fallacy. Let it be shown that in spite of ample facilities for divorce there are few, and then it may be argued that high morals exist.

At this point the question naturally arises of where the authority lies to make the necessary change in jurisdiction. Sub-section 26 of sec. 91 of the B.N.A. Act gives the Dominion authority to legislate on matters of "Marriage and Divorce", while sub-sec. 14 of sec. 92 gives to the Provinces "The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including the procedure in civil matters in these Courts". From the above, it is obvious that it

is within the powers of the Dominion Government to enact that all jurisdiction as at present exercised over the question of divorce shall cease, that in the future such jurisdiction shall be exercised by such authority as the Dominion sees fit to enact, and that the grounds for divorce and annulment and the consequences of a decree shall be as enacted by the Dominion. Questions of procedure must be left to the Provincial Governments or to the rules made by the Judges under the authority of Provincial Acts.

What Courts should exercise this jurisdiction? Mr. Holmested, in Marriage Laws of Canada (1912), recommends a Dominion Court which would sit once a year in each Province, with an appeal to the Supreme Court of Canada. The objections to this are the delay, the probability that it would sit at but one place in the Province, the necessity of filing papers at the Court's headquarters in Ottawa, and the great variation from the present situation in Province with Courts with jurisdiction. The principle advantage would be the continuity in the interpretation of the law, an advantage which rather reflects on the ability of the Judges in the Provinces to give a just and correct interpretation of the law. Mr. Nickle's recent bill proposed to give jurisdiction to the existing and special Provincial Courts and to the Exchequer Court of Canada, the latter provision being suggested because many of the Judges in Quebec are Roman Catholics and are therefore supposed to object to divorce on any grounds, a suggestion which points to one of the obvious weaknesses in the position taken by the Roman Catholic Church—namely that its teachings on the subject are not observed by many of its own adherents. It would seem to be a matter which might easily be left to arrangements on the part of the Judges themselves—i.e., that only Protestants should try divorce cases. Also, it might be observed that Judges are on the bench not to administer such law as meets with their personal approval, but all law. In the United States, the divorce jurisdiction in some States is exercised by the Supreme Court of the State and in others by the District Courts. In England all cases have to be tried before the Divorce Court sitting at London; but the Commission of 1912 recommended that the jurisdiction be transferred to County Courts. The question of divorce is one which goes right to the root of society and one which therefore warrants the attention of the best Judges in each Province. It is also desirable to introduce as little complication as possible into all legal matters and to vary from that to which the people have

been accustomed as little as possible, provided justice and efficiency is guaranteed. With the system of the Supreme Court of each Province holding frequent sittings at various points throughout the Province, all these fundamentals would most certainly appear to be adequately secured by giving jurisdiction in matters of nullity and divorce to the existing Supreme Court of each Province, with the right of appeal in the usual way to either the Supreme Court of Canada or the Privy Council.

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Houston v *Moore*, (1820) 5 Wh. 1 at p 69, Marriage, Divorce and Separation, vol. 2, sec. 1619, p. 616.

The next important question in connection with the decree is that of alimony. The following figures for the United States for the year 1916 are of interest: (U.S. Report, p. 22).

Per cent. of divorces granted in 1916.

To Husband		To Wife	
Alimony Asked	Granted	Asked	Granted
6	5	27	20

In the United States, England and Canada, the law is almost the same, and may be stated quite briefly. The final decree may be withheld pending the settlement of alimony and arrangements therefor.

Two types of alimony are known to the law:

1. Alimony *pendente lite*—based on the right of a wife to support; during the proceedings from their very nature she can not co-habit with her husband; therefore he must support her elsewhere. It is usually calculated by adding the wife's income to that of her husband, taking one-fifth of the total, and deducting from that the wife's income, the result being the alimony if any which is to be paid. If this sum is unreasonably large it may be reduced.

2. Permanent alimony—usually calculated on the basis of dower of one-third of the husband's income, but the wife's need and the husband's faculties are considered.

The wife being by common law under no circumstances to be required to maintain her husband nor contribute to his support can never be compelled to pay alimony; some of the States have provided statutory exceptions to this rule. Alimony, unlike the general subject of divorce, is a matter in which the public can have little or no special interest, and therefore any just bargainings of the parties concerning it will not be regarded as collusion, but will be upheld. Besides alimony, the wife may be allowed a sum for costs in bringing or defending an action. Alimony in amount is subject to variations from time to time as circumstances, needs, and pecuniary conditions of the parties change. In some instances alimony has even been allowed to a guilty wife. Parliament's attitude to alimony is similar to its view of the custody of children.

In regard to property generally, the parties to a divorce after a decree has been granted can convey free from dower

and curtesy. In some exceptional cases, even Parliament has gone so far as to debar the husband from any interest in the wife's estate (*Holliwell* case 1878,) but usually this is not done as the effect of the divorce unless the bill provides otherwise is to restore the parties with respect to their property to the position which they would have occupied had the marriage never been solemnised. In England probably more than in the U.S.A., there is a tendency to alter marriage settlements. Unless this is definitely done by the Court, the settlements remain unchanged, and even the guilty party forfeits no rights accruing under such settlements; the Court may, however, retransfer all property brought into settlement, the principle being to leave the children and the innocent party in as good a position as before the home was broken up, even though it means giving them income from property brought into the marriage settlement by the guilty party.

When a marriage has been annulled, the former wife resumes her maiden name. If the marriage has been dissolved by way of divorce, the wife retains her husband's name, although in some of the States, statutes give her the right to revert to her maiden name. The more reasonable course would appear to be that the parties having been put in all other respects in the position as though the marriage had never occurred should be so treated in regard to their names, and this especially so in view of the confusion which might occur where a divorced husband re-marries, and there are then two women using the same name. On the other hand, an objection arises where there are children, as their unfortunate position would probably be unduly borne in on them if their mother was to revert to the prefix Miss.

The English practice which is followed in Canada, provides that the husband may in a suit for divorce on the ground of adultery, sue for damages from the co-respondent, which may be granted even in certain cases when the divorce itself is refused, as where the offence has been condoned or the respondent has yielded under the influence of force. The amount of damages is assessed by a jury, and must represent only simple damages; punitive or exemplary damages are not allowable. Among grounds for reduction of damages may be urged the fact that husband and wife were not living together; the fact that the co-respondent did not know that the respondent was a married woman; or the fact that the woman

was openly living in prostitution. The damages awarded do not *ipso facto* go to the husband, but the Court determines their application, usually giving part to the husband, to the children, and even in some cases to the guilty wife as a measure of prevention to her prostitution.

NOTE.—Since writing the foregoing article our attention has been drawn by Harvey, C.J., of Alberta, to the omission of two recent cases, one in Saskatchewan and one in Alberta, dealing with the subject of jurisdiction in relation to domicile. The cases are *Kalenczuk* v. *Kalenczuk* (1920), 52 D.L.R. 406; 13 S.L.R. 262; and *McCormick* v. *McCormick* (1920), 55 D.L.R. 386, 15 Alta. L.R. 490.

(*Concluded*).

EVIDENCE BY DECLARATION.

We are indebted to the courtesy of Hon. Mr. Justice Riddell for a copy of a paper on the above subject which will be found of special use to coroners, magistrates, and medical men in the many cases which require "first aid" from a legal stand point where crime is suspected. He thus states the origin of the Paper:—

"A few weeks ago, by reason of a misunderstanding between the Crown Officers of Toronto and the authorities of the Toronto General Hospital, I was requested by the Attorney General to preside over an informal but representative Committee to consider the proper practice in cases of apparent crime. *Inter alia* it was agreed that it would be of advantage that a simple and practical statement as to "Dying Declarations," "Ante Mortem Statements" or "Evidentiary Declarations" should be prepared for the guidance of medical men generally and those in hospitals particularly. I have prepared the following after conference with experienced Crown officers and medical men: I am, however, wholly responsible for the document."

The learned Judge then deals with the subject as follows:—

The general rule of our law is that only what is said under the sanction of an oath (or of its legal equivalent) can be received as evidence. But for about two hundred years, the English law, which our law follows, has made an exception in what have been called "Dying Declarations," or "Ante Mortem Statements"—sometimes "Evidentiary Declarations."

When a judicial investigation is being made into the death of any person by homicide, statements made by that person respecting the circumstances resulting in his death, are admitted in evidence, if such statements are made by him when under the influence of a conviction that his death is impending.

Sometimes such evidence is of the very greatest importance, since frequently no third person was present. It is, of course, the duty of every good citizen to disclose crime and to preserve evidence of it. A medical man, therefore, attending a patient likely to die under circumstances indicating a crime by act of omission or commission which directly or indirectly caused his death, should endeavour to obtain such evidence from him as is available; and this sometimes is as useful to protect the innocent accused of crime as it (more frequently) is to convict the guilty.

This is not (as it is sometimes offensively put) to act the part of a detective, but to act the part of a good citizen and it is called for only in cases of apparent homicide where there is reason to suspect that the condition of the patient is due directly or indirectly to crime, foul play or criminal negligence.

Speaking generally, it is always wise for the doctor as soon as he thinks that a case is hopeless, to inform the patient of the fact—he may have affairs to settle, a will to make, directions to give, etc.

Difficulties may sometimes arise as to which it is impossible to lay down any fixed rule—for example the patient may be of such a temperament that a statement of this kind would probably cause death sooner than it otherwise would occur, etc. Medical men are always conscious that (speaking generally) their first duty is to the patient, and that consequently nothing which can be reasonably and properly avoided should be done which is likely to harm the patient; and yet, exceptional cases may occur in which the private must give way to the public good. The medical man must face the situation if and when it arises and determine as his conscience and sense of public duty dictate. Cases of this kind are exceptional; and in no case should fanciful or captious objections be raised; in all cases of real difficulty, the Crown Attorney should be at once consulted.

To make a Declaration evidence, there must be in the mind of the patient an impression of impending death—if he believe that his case is hopeless, but that there will be a prolonged continuance of life, a Declaration is not admissible. There must be expectation, a hopeless expectation, of death near approaching. It is of no importance that the physician or any other than the patient, thinks he may or will recover—the import-

ant thing is the expectation of the patient. Nor is it of any importance how this expectation is indiced, whether from the patient's own observation, statements of medical men or otherwise—the essential matter is its existence, however induced.

This expectation, impression and conviction that death is impending, may be manifested by the patient in any of several ways—he may say so in so many words or he may indicate his conviction of impending death by changing countenance and appearing distressed or terrified when he is informed of it, etc. He may do this without any words of apprehension; and still make his conviction clear.

It is of great importance for the ends of justice that the attending physician should not only make the state of the patient unmistakably clear to him, but also that he should, if possible, obtain unmistakable evidence that the patient was convinced and without hope.

Where there is ample time, the Police and Crown authorities may be communicated with to take the Declaration; but no chances should be taken whereby the evidence may be lost.

The doctor should satisfy himself that the patient understand what is said to and by him. The Declaration may be elicited by questions put to the patient. Everything said by him in respect of the circumstances causing death should be noted, even if it may seem to be immaterial.

It is very desirable that the Declaration be reduced to writing; where circumstances permit, it should be read over to the patient; and if he is able, he should be got to sign it; witnesses present should also sign as witnesses. Magistrates sometimes examine a patient on oath and the examination is signed by both—this is permissible.

It is, however, not absolutely necessary that the Declaration be reduced to writing at all. If circumstances do not permit of a written Declaration, an oral Declaration should be obtained. In that case, all present should take full notes of what is said, so that the memory may be refreshed (if necessary) when evidence is to be given of the Declaration. (Such notes are, however, not evidence in themselves.)

If the Declaration be reduced to writing and circumstances prevent its being signed by the patient, the witnesses should sign it after making certain that it is accurate—the absence of the signature of witnesses is not fatal to the Declaration but such signature is always advisable.

The Paper concludes with the following practical rules which are thus tersely stated:—

1. A Declaration is admissible in evidence only concerning the circumstances resulting directly or indirectly in the death of the patient himself.

2. It must be made under the influence of a conviction in the mind of the patient that his death is impending.

3. It may be made to anyone.

4. The doctor should not imperil the obtaining of such Declarations by waiting for the Police or Crown authorities.

5. Where there is ample time it is well to communicate with Police and Crown authorities.

6. A Declaration may be obtained by questions; and when the statements of the patients are not full, it is often well to supplement them by information obtained in answer to questions.

7. Where possible the Declaration should be reduced to writing, read over to and signed by the patient—if it is also signed by witnesses, this is the ideal Declaration.

8. But a written Declaration without signature is admissible.

9. And so is an oral Declaration.

10. In case of any difficulty at any stage, the Crown officers should be at once consulted.

11. In all cases of doubt, the Declaration should be taken, leaving it to the Court to determine its admissibility and value.

12. Crown and Police authorities generally prefer to take the Declaration by stenographers—these rules are however, not intended for the guidance of such authorities—but for medical men or laymen who can seldom obtain stenographic assistance.

BLUE SKY LEGISLATION.

The Bill respecting the Sale of Securities introduced in the Ontario Legislature during the Session just closed, and to which we referred *ante* page 121, has been held over until next Session, owing, no doubt, to the desire of the Government to give the fullest opportunity for a careful consideration of the important questions involved and also by reason of the large amount of necessary legislation already before the House. The Bill has been referred to a special committee composed of thirteen members of the Legislature. The committee will sit early in the Fall, and will hear any interests which desire to make known their views upon the subject.

Review of Current English Cases.

(Registered in accordance with the Copyright Act).

By CECIL CARRICK, Barrister-at-Law.

Solicitor—Lien for costs—Partnership Action.

Dessau v. *Peters;* Rushton & Co., 1922, 1 Ch. 1. (Sargant J.)

When after an order has been made for dissolution of a partnership, and a receiver appointed of the partnership assets, the plaintiff in the action changes his solicitors, the former solicitors cannot assert their lien for costs of the action by retaining papers that have come into their hands in the course of the action, but must deliver them up upon receiving the usual undertaking by the new solicitors for preserving their lien. A partnership action is one in which not only the plaintiff but other parties are interested in not having the determination deferred of the questions to be dealt with, and a solicitor has only such qualified lien on his client's documents as is recognised in other cases where the client is not the only person interested.

Will—Condition contrary to public policy.

In re Boulter, Capital and Counties Bank v. *Boulter,* 1922, 1 Ch. 75, (Sargant J.)

A gift was made to grand-children upon the express condition that they should not, during their respective minorities, reside abroad except for periods not exceeding six weeks in each year, with a provision for forfeiture on non-compliance. It was held that this condition was a condition subsequent, and that as it tended to the possible separation of the children, from their parents it was void as being contrary to public policy.

Sale of business—Delay in completion.

Golden Bread Co. v. *Hemmings,* 1922, 1 Ch. 162. Where premises are sold together with the goodwill of the business being carried on therein, and the contract is not completed on the day fixed for completion, by reason of the default of the purchaser, the vendor is entitled to carry on the business at the purchaser's risk; and to be indemnified by him for losses so incurred, provided that he informs the purchaser promptly of what he is doing, and that the business is being carried on at a loss.

Sale of goods—Merchantable quality.

Sumner Permain & Co. v. *Webb & Co.,* 1922, 1 K.B. 55, (Court of Appeal). "An implied condition that goods shall be of merchantable quality" does not include the quality of being

legally saleable in the market for which they are intended. See Sale of Goods Act, 1920 (Ont.), Sec. 16, (b).

Mandamus—Contempt of court—Municipal council.

The King v. *Council of Metropolitan Borough of Poplar, Ex parte London County Council, Ex parte Managers of Metropolitan Asylum District*, 1922, 1 K.B. 95, (Court of Appeal). A corporation which is a notional body, cannot be attached for disobedience to a writ of mandamus issued against it. If it is sought to attach individual members of the corporation for disobedience to the writ of mandamus, their names should be inserted in the rule nisi, and it should be served on each of the members so named personally, together with a copy of an affidavit specifying the nature of the contempt with which he is charged.

Sale of goods—Engine affixed to freehold.

Underwood Limited v. *Burgh Castle Brick and Cement Syndicate*, 1922, 1 K. B. 123, (Rowlatt J.). An engine affixed to a vendor's premises is not in a deliverable state. It is not even a chattel, until the vendor has exercised his right to sever. Consequently the property in it does not pass at the time a contract for sale is made. See Sale of Goods Act, 1920 (Ont.) Sec. 20, (a) and (b).

Carrier—Exemptions from liability—Diversion from prescribed route.

Neilson v. *London & North Western Railway Company*, 1922, 1 K.B. 192 (Court of Appeal). Where a carrier has exempted himself from his common law liability in a contract which has reference to conveyance by a prescribed route alone, and the goods have been diverted by him from the prescribed route, they cease to be covered by the contract, and by the exceptions which it contains.

Landlord and tenant—Covenant against sub-letting.

Commissioners of Works v. *Hull*, 1922, 1 K.B. 205. (Appeal from Greenwich County Court.) A tenant in breach of a covenant not to sub-let or assign without the landlord's permission, assigned his tenancy and subsequently disappeared. An action against the assignee of the tenancy to eject him as a trespasser is a sufficient indication by the landlord of his intention to exercise his option to forfeit the tenancy for breach of the covenants, and the tenancy of the original lessee and of the assignee is thereby determined.

Will—Construction—Gift in trust for such son (living at his death) of testator's son as first or alone attains twenty-one — Contingent or vested interest — Intermediate rents and profits.

In re Astor, Astor v. *Astor* 1922, 1 K.B. 364, (Court of Appeal). This was an appeal from the judgment of Russell J. By his will the late Viscount Astor devised certain lands "upon trust in fee simple or absolutely for such son (living upon my death) of my son W. A. as first or alone attains the age of twenty-one years, or, failing any such son, then upon trust as part of my residuary estate." He gave his residue in trust for both or either of his sons W. A. and J. J. A. who should survive him, and if both, in equal shares. When the testator died he left surviving four sons of W. A. the eldest of them being then thirteen years of age. One of the questions which Russell, J. was asked to answer, on an originating summons, was whether the plaintiffs W. A. and J. J. A. had until one of the four grandsons of the testator should have attained the age of twenty-one years the powers of a tenant for life. It was held by Russell, J. following *In re Francis*, 1905, 2 Ch. 295, that a devise of real estate to a devisee, when he shall attain a certain age, or if he shall attain a certain age, without any further context to assist, is contingent, and the attainment of the prescribed age is a condition precedent to the estate vesting in him. He declared further that such further context might be found, for example, in a gift over in the event of the devisee not attaining the required age. In this case there was a gift over, but was there any person in whom the estate could be said to be vested? If the gift had been "for the eldest son (living at my death) of my son W. A. when he attains 21, and if he dies under 21 then for the next eldest son" (and so on with a gift over on the death of all such sons of W. A. under 21 years, there would be no difficulty in holding that the eldest son took a vested estate in fee simple, liable to be divested if he died under the age of 21 years). (See *Phipps* v. *Achers* (1842), 9 Cl. & F. 583). In this case, however, the gift is to such member of a class as first attains a specified age. There is no gift to anyone who does not answer the whole of the description. The devisee cannot be ascertained until one of the grandsons of the testator attains the age of twenty-one years. The persons entitled to the intermediary rents and profits for the period until one of the grandsons atttains twenty-one years are the residuary

legatees. On appeal the judgment of Russell, J. was upheld. Estates must remain contingent until there be a person having all the qualifications that the testator requires and completely answering the description given of the object of his bounty in his will.

Principal and agent—Sale—Surreptitious dealing by agent of one principal with other principal — Avoidance of contract—Recovery of deposit.

Alexander v. *Webler,* 1922, 1 K.B. 642. Bray J. The original plaintiff in this action agreed to buy from the defendants a motor car for £2250., subject to an examination by his chauffeur. He paid a deposit of £250. Later he wrongfully repudiated the contract, and would have failed in his action to recover the deposit. During the pendency of the action he died. His executors, who were substituted as plaintiffs, discovered that the defendants had promised the chauffeur a share of the profit if his employer bought the car. It was held that even although the original plaintiff had repudiated the contract before the fraud was discovered, yet the principle laid down by James, L. J. in *Panama and South Pacific Telegraph Co.* v. *India Rubber* L.R. 10 Ch. 515, 526, applied, viz. "that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principle, cognizable in this Court. That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him." The plaintiff recovered his deposit.

Arbitration—Right of each party to be present at hearing of other party.

W. Ramsden and Company Limited v. *Jacobs,* 1922, 1 K.B. 640. Bray J. In an arbitration held under an arbitration clause in a contract respecting the sale of goods the arbitrators obtained written statements from the parties, then asked them separately to state their cases, each in the absence of the others. On a motion to set aside the award, it was held that this procedure was absolutely wrong, and that even although no objection was made at the time, the award must be set aside.

Insurance (unemployment)—Charwoman engaged in cleaning solicitor's office—Employed in any trade or business.

In *re Wilkinson*, 1922, 1 K.B. 584. Roche J. This was a reference under the Unemployment Insurance Act 1920. While there is no corresponding Act in Canada, this case is of some interest to the legal profession, in that Roche, J. stated that in his view a solicitor's practice, at any rate in London, is a pursuit upon lines sufficiently commercial to bring it within the term "business," as distinguished from an occupation such as that of a school master which is not organized and conducted upon commercial lines. He further held that a charwoman who cleans a solicitor's office is not employed in his business. Counsel agreed that the laundress who performs the like service for a member of the Bar was not employed in the carrying on of the profession of a barrister.

Apprentice — Dismissal of apprentice by master — Misconduct of apprentice—Repudiation of agreement.

Waterman v. *Fryer*, 1922, 1 K.B. 499. This was an appeal from the Portsmouth County Court. The plaintiff was an infant who put himself apprentice to the defendant for five years. The defendant undertook to instruct him in the trade of motor and cycle engineer, and he undertook to faithfully serve the defendant. In the action the plaintiff claimed damages for breach of the agreement to teach, and for wrongful dismissal. The County Court Judge had held that the plaintiff so misconducted himself that his misconduct amounted to a repudiation of the agreement. The Divisional Court which heard the appeal after applying the rule that an infant cannot assent to a revocation of a contract unless such revocation is for his own benefit referred the case back to the trial Judge for a finding as to whether repudiation of the contract by the infant would or would not be for his benefit.

Bench and Bar.

Lady Barristers.

The Inns of Court in England have at length opened their doors to women barristers. The first case was that of Miss Ivy Williams who was called to the Bar by the Inner Temple on May 10th; the first of her sex to obtain that distinction in the most conservative body in conservative old England. She had gained a remission of terms owing to certificate of honour. Other women students we are told will shortly qualify for call.

Privacy of Jury Deliberations.

The English Court of Appeal has taken the opportunity of passing severe censure upon the publication of an interview with the foreman of a jury in a recent criminal trial concerning the opinions expressed and the deliberations in the jury room. All discussions between the jurors should be treated as private and confidential, both on the ground of public policy and to secure finality. Every one will agree with Lord Justice Bankes when he said: "Speaking for myself, and, I am sure, for a large number of other persons, I saw the other day with astonishment and disgust the publication, in what are generally accepted as respectable newspapers, of a statement by the foreman of the jury in a criminal case, which attracted much public attention, as to what took place in the jury room after they had retired. I feel confident that anybody who read that statement will realise the importance of maintaining the rule, as it has been generally accepted, and I say nothing as to whether a person who invites such a statement and publishes it does or does not commit contempt of court." Lord Justice Warrington concurred, and laid stress upon the extreme impropriety of publication by any means of what took place during the deliberations of a jury after they had retired to consider their verdict, while Lord Justice Atkin also expressed complete agreement with the other Lords Justices.

Coercion.

Mr. Justice Avory is to preside over another Committee appointed by Lord Birkenhead to consider the doctrines of the criminal law with reference to the wife's responsibility for

crimes committed by her in the presence of or under the coercion of her husband, and to report what changes are desirable. The terms of reference are sufficiently wide to enable the Committee to propose amendments of the law which will preclude the defence of coercion where, in fact, it does not exist, and at the same time to protect the woman in those cases where the marital influence is strong enough to negative criminal intent.—Law Times (Eng.)

Correspondence.

The Editor,
Canada Law Journal,

Dear Sir:— Re Rule 248—Notice of Trial.

Rule 248, clause "a," requires that ten days' notice of trial shall be given before entering an action for trial, except in Toronto cases. I find differences of opinon as to the meaning of this rule. My own interpretation is that it means that, before entering an action for trial, a full ten days' notice of trial must have elapsed. I have always acted upon this in practice, but I find that, in the counties of Bruce and Grey, a different practice prevails and a different interpretation is placed on the rule by the Court officers. The marginal note in Holmested upholds my own view, as well as the notes on page 711, in which it is stated that the action may be entered "after the lapse of ten days from the giving of notice of trial." Practice should be uniform, and apparently the matter has never been the subject of a decision. A note in the Canada Law Journal would be interesting to a number of practitioners.

Yours truly,
C. J. MICKLE.

Clause (b) of R. 248 does not appear to us to require that 10 days must have elapsed after service of notice of trial before an action can be entered for trial. The 10 days in clause (a) and the six days in clause (c) of the Rule we think may run concurrently. See *Mayfair Investments* v. *Somers*, 150 W.N. 95.—ED. C.L.J.

Flotsam and Jetsam.

Canada at the Front.

The following eloquent tribute to our soldiers of 1915 was written by an appreciative journalist across the border, and appeared in the Cleveland News of April 22nd, 1922:—

North, over the border, to-day in every community leal-hearted citizens of the Dominion are holding commemorative services for the sons of the maple, lying in Flanders fields, who held the line for liberty from April 22 to April 24 seven years ago. In proud and loving memory mothers and fathers of these heroes recall the battle of battles of the World War, in which the picked conscripts of continental Europe hurled themselves for three consecutive days on the flower of the youth of Canada and in the end retired baffled, leaving on the field thrice 10,000 dead.

The true story of the world's salvation from militarism by that little band of stalwart souls, known as the First Canadian Division, history will tell. The battle of St. Julien was the start of a series of displays of Canadian heroism and efficiency that marked the Flanders and Picardy campaigns of the great war wherever emergency occurred, and which has added to the glory of patriotic achievement the events chronicled by the names of Festubert, Givenchy, Vimy, Cambrai and a score more.

Untested men from farm and factory, numbering less than 10,000, had been placed between two French armies to block the enemy's determination to achieve the French channel ports. To Von Falkenhayn's command to his German troops to pulp the Canadians and break through, no matter the cost, an answer was given which ranks St. Julien with Thermopylae and The Alamo, with the difference that St. Julien had her messengers of victory, albeit they numbered but 400, all that was left of Canada's vanguard in the fight for civilization.

Deserted by the Algerian corps on its left; its right bared by the retreat of the extreme eastern French wing, this pigmy army stood. Defying the repeated charges of the magnificent Prussian guard, 10 service battalions of which dissolved themselves against that unbreakable human wall; scornful alike of gas and bomb these Canadians fought for 72 hours to achieve

the result their commander curtly ordered in the words: "The line across St. Julien Wood must be held. The Canadians will hold it."

And when, after the three-day agony, the third British army came to the relief and the battered men of the western continent marched out, no more inspiring sight was ever witnessed than the little army passing through in-facing serried ranks of seasoned British warriors, each rigidly standing at "the present." The salute of St. Julien is Canada's forever!"

We are requested to announce that the University of Toronto Press has in hand for the Historical Association of Annapolis Royal and will issue shortly a *Book of Remembrance* containing a record of the activities of the Association during part of 1921, as well as verbatim reports of speeches made and papers read on the occasion of the Triple Celebration of Historic events in old Fort Anne on the thirty-first of August that year. The issue will be limited to three hundred numbered copies—full cloth bound, with gilt title and illustrated.

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TO OUR READERS.

The life of this Journal has been a long one, as time is counted in this young country of ours, but we are glad to be told that it has been a useful one in its day and generation. It was commenced and has been carried on not as a commercial venture or in connection with or under the control or management of any business concern, but as a labour of love, simply seeking to be a means of communication between members of the profession; to represent them as a class; to further their legitimate interests and aims; to be a medium for imparting information on legal matters; and in suggesting improvements in the law and its administration and in simplifying practice and procedure; and, in all this, acting as the organ of the profession,—serving it to the best of its ability and upholding its honour and dignity.

We are proud and glad to know that in his report we can quote as an authority the words of one who is the most worthy and respected founder of the Canadian Bar Association and, as its present President, may be considered as now standing at the head of the profession in Canada, and who in that capacity has by his energy, ability and generosity made a seeming impossibility a marked success.

In answer to our letter agreeing to his suggestion that the Canada Law Journal should continue its existence as a component part of the Canadian Bar Association Review, he writes as follows:—

"Dear Mr. O'Brien,—

"I thank you for your cordial letter of September 29th.

"For almost fifty years you have done excellent service for the Bar of Canada by the publication of your Canada Law Journal. In addition to its practical uses you have always in it upheld fine professional ideals. Now you are showing the same kindly and generous spirit and a desire to still further help the profession by transferring to the Association that Journal, to the end that, in the proposed Canadian Bar Review, the spirit

and tradition of your publication may be continued and perpetuated. I join most sincerely with you in the hope expressed in your letter that our expectations for the future of that new magazine may all be realized and that you may see in it the fruition of your "labour of love" throughout these past years.

"I am grateful for your good wishes in respect of the Association in future.

"Very sincerely yours, J. A. M. AIKINS."

The Journal came into existence in the town of Barrie, county of Simcoe, on January 1, 1855, under the name of "The Upper Canada Law Journal and Local Courts Gazette," and under the editorial management of "James Patton, Esq., Barrister-at-Law, and others"—The others were James Robert Gowan, Judge of the County Court of the County of Simcoe,—afterwards well known in the history of Canada as Hon. Sir James Gowan, K.C. M.G., Senator of Canada, and Hewitt Bernard, a partner of James Patton and afterwards known as Col. Bernard, K.C., Deputy Minister of Justice. Mr. Patton, for a short time Solicitor General of Upper Canada, was the founder of the firm of Patton, Osler and Moss, and later a partner of Sir John A. Macdonald. He was subsequently Collector of Customs at Toronto.

The principal contributors to the Journal were Judge Gowan and Mr. Bernard, Mr. Patton attending to the many other matters well known to those who enter the busy field of journalism.

An incident connected with the birth of this organ of the legal profession in Canada may be of interest and worth noting. The present Treasurer of the Law Society of Upper Canada, Hon. Featherston Osler, recently one of the Justices of the Ontario Court of Appeal, was a law student in the office of James Patton, as was also the present Editor of this Journal. One morning Mr. Patton requested their attendance in the attic over the office, where they found sheets of brown paper and a pile of the first number of The Upper Canada Law Journal and Local Courts Gazette, also a pot of paste and brushes. They were told to wrap up and direct and mail the new publication to the persons to be found on a list of names also provided. This they did, little thinking that 57 years afterwards one of them would be writing these parting words to its readers and that his life-long friend would read them. He tells

me, *en passant*, that our Master in the Law told us to be careful to put "Esquire" after the names of Division Court Clerks, but that a simple "Mr." would be sufficient for the Bailiffs.

In those days special attention was given, and properly so, to the administration of law in connection with Magistrates, Municipalities and the newly formed Division Courts. The Law Journal, with such a man as Judge Gowan in charge of these departments, was the most important factor in giving them efficiency and in producing uniformity of practice and procedure throughout all the counties of our present province of Ontario.

The next year (1856) Mr. W. D. Ardagh, Mr. Patton's partner, took charge of the Journal and was connected with it until some years later he went to Manitoba as County Judge at Winnipeg.

In 1857 the office of publication was moved to Toronto, when Robert A. Harrison, B.C.L., Deputy Attorney General, joined Wm. Ardagh, who had become a partner in the firm of Crawford, Hagerty & Ardagh. From this time, and on until Mr. Harrison became Chief Justice of the Queen's Bench, Judge Gowan was the life and soul of the Journal, and the largest contributor to its columns.

The year 1864 saw the end of the Old Series, published in quarto form. Vol. 1 of the New Series appeared in 1865 in its present octavo form, with the name of Henry O'Brien as one of its Editors along with Wm. D. Ardagh and Robt. A. Harrison. Mr. O'Brien was at that time the Reporter in Practice Court and a partner of Mr. Christopher Robinson, a partnership which lasted with an unbroken fellowship for over thirty years. He is responsible for anything that has appeared in the Journal since the New Series began. His more than half a century of hard work was mostly a labour of love, but withal a pleasant one, thanks to the kind sympathy of an indulgent profession and frequent aid from many who helped to lighten his self-imposed burdens.

It may not unjustly be said that in the two series of the Journal may be found a record of, or reference to, almost everything that is of interest in the legal history of the Province, e.g., changes suggested or effected in criminal and civil procedure, and sketches of the lives of eminent members of the Bench and Bar. As one illustration of many changes effected

by the Journal by means of persistent urging in its columns, was the introduction of the system of County Crown Attorneys, which has continued without any material change up to the present time. Much of the information referred to cannot be found elsewhere, or is not easily accessible, and the lawyer in his leisure moments may find in the Journal a mine of information, and even amusement.

It is a great pleasure to us to hear that our old friend and most welcome contributor in former days, and whose name is well known to our readers, becomes the editor of *The Canadian Bar Review*. We are glad that the pen we lay down is to be taken up by one so competent for the task he undertakes as Dr. Charles Morse, K.C., D.C.L., Registrar of the Exchequer Court at Ottawa.

CANADIAN BAR ASSOCIATION.

The Annual Meeting of this Association was held, as our readers are aware, during the month of August last at Vancouver.

It was as usual most interesting. The President, Sir James Aikins, K.C., conducted the proceedings with his usual tact and courtesy. Many distinguished visitors were present, several from the United States, and Lord Shaw from Edinburgh, one of the most respected of the Scottish Law Courts. A full report of the proceedings will hereafter appear in the Canadian Bar Association Review. We have only room at present for the President's address and the report of the Committee on the Administration of Justice.

THE PRESIDENT'S ADDRESS.

By the by-laws of the Association the Annual Presidential Address is a necessity which you and I on this occasion will have to suffer. It will not, however, be entitled "De Profundis." The large quantity of fine food for thought which has been swallowed by those of you who have just attended the Meeting of the American Bar Association will require according to the custom of that Association at least twelve months to fully digest. Those who attend this Meeting will be similarly rationed—accordingly the first course of such a meal should be light.

It cannot be otherwise for I prepared it out of my larder exhausted of any substantial stuff it ever contained by six previous presidential addresses.

"Laws are not our life, only the house wherein our life is led, nay, they are but the bare walls of the house; all whose essential furniture, the inventions and traditions and daily habits that regulate and support our existence are not the work of Dracos and Hampdens but . . . . of philosophers, alchymists, prophets, and the long forgotten train of artists and artisans, who from the first have been jointly teaching us how to think and how to act, how to rule over spiritual and physical nature.

To each nation its believed history is its Bible, (so saith Carlyle.)

"Law, man's sole guardian ever since the day when the old brazen age in sadness saw love fly the world."

"Law teaches us to know when we commit injury and when we suffer it."

Consideration of such quoted thoughts helps one to understand such proverbs and phrases as "Like law, like people." (Port) The Laws of a nation give an outline of its history. Law is a record of the progress of civilization. May I for a little while lead you in some reflective wanderings among those well weathered and well architectured ideas. The steps which usually lead up to the house wherein our life is led are the peoples common thought and acts—daily habits approved customs laws. It has been said "If a man were to make all the ballads he need not care who should make the laws of a nation."

This may be interpreted as meaning that the familiar songs of a people express and also mould their thought, manners, usage traditions, faiths and glories, out of which spring National Spirit and National Laws. What inspiration, sympathy and unity were created in England by the popular ballads and songs of the passing centuries; what in Scotland by the vocal music of its bards (My Lord Shaw I said vocal music though perhaps the skirl of the bagpipes may be traced in the spirit and the laws of the Scot) and by the poetry of Burns and Scott. What in Ireland by its early minstrelsy, and by the lyrics of Tom Moore. The heart of the people of the British Empire and the United States is made sorrowful, because

synchronizing with the silence of the Irish Popular Songs is anarchy and the defiance of the law which, if even now observed and obeyed, would be the bulwark of Irish liberty as it is of ours, for the liberty of a free state is the privilege and power to do everything that the laws permit, and to make those laws.

"The harp that once through Tara's halls
The soul of music shed,
Now hangs as mute on Tara's walls
As if that soul were fled."

Let us hope that it has not fled and that the people of Erin, overcoming and controlling themselves, may, without fear, abide and work in the green pastures and beside the more peaceful waters, and become a strong unit in the British Empire.

Who can estimate the influence of their nationalizing effect upon the people of the United States of their popular songs. I will not say Yankee Doodle, though no doubt it has had its effect, but such songs as "Swanee River," "My Old Kentucky Home," which we, in Canada, also sing without hurt to our young and sensitive national pride.

No Canadian can be too thankful for the inspiring, comforting, uniting and Canadianizing influence of the Chansons Populaires du Canada, including Claire Fontaine, and the songs of the Great Dominion, among which is the Maple Leaf. As you listen to this varied music in the concert hall of our Anglo American Canadian Civilization you hear the voices of the singers blend into great national choruses of their several lands.

Here "O! Canada! our home and native land
We stand on guard for thee."

There "The Star Spangled Banner, Oh, long may it wave
O'er the land of the free and the home of the brave."

Yonder "When Britain first at Heaven's command,
Arose from out the azure main
This was the charter of the land,
Britons never shall be slaves."

And then in unison all sing the same great tune, expressive of the same sentiment of love and loyalty to their own country though differing in words.

"My country 'tis of thee" and
"God Save our Gracious King."

NATIONAL SPIRIT AND THE LAW.

Such songs and the inventions, the traditions and daily habits that regulate and support our existence, and the teaching in family and school mentioned by Carlyle generate in a united people a National Spirit, or National Soul, that is, if they are worthy a place in history. A Swiss Bluntschli enunciates it thus:

"The nation is not a mere sum of citizens; and the State is not a mere collection of external regulations. . . . . The one national spirit which is something different from the average sum of the contemporary spirit of all citizens, is the spirit of the State; the one national will, which is different from the average will of the multitude is the will of the State . . . . To extend the reputation and the power of the State, to further its welfare and its happiness, has universally been regarded as one of the most honourable duties of gifted man."

The nation exists to develop the most perfect type of citizen, of loyal citizen and to further the welfare and best interests of all who compose it. To that end there is nothing more sacred, more essential than the protection and fostering of a sane group mind and laudable national ambitions.

It is said the past lights a lamp for the guidance of the present age, but the national spirit though originating in the past is not only a light but a leading and compelling power, and gives direction to national activities, aspirations and laws.

"There is a mystery in the soul of state
Which hath an operation more divine
Than tongue or pen can give expression to."
(Shakespeare).

Why are the United Kingdom, the United States, Canada, and those Dominions under the Southern Cross, so alike in song, in sentiment, in laws, why? Because though they possess diversities of gifts, they are born of the one spirit, the British spirit, they are many members but one body, that is, one enveloping civilization in which there should be no schism.

"TO CIRCUMSTANCE AND CUSTOM LAW MUST YIELD." (Span. pr.)

Now the sources of a nation's song and spirit are the causes of a civilized nation's laws, but there is this difference—the songs and spirit lead in the formation and confirmation of customs, usages and habits, then law follows, sometimes too far

behind, and makes out of them rules of conduct, for instance, the common law passed by no Parliament was the crystallization of those usages which have stood the test of time into law by judicial decision and interpretation. But usages and methods change to suit the requirements of the day, and on occasion, swiftly. Indeed instant regulations are sometimes essential for new discoveries and inventions. The Common Law, Code Law, and Constitutional Law, are constantly altering and advancing to harness, control and utilize the new born thoughts and expressed wishes of people. The Common Law of Blackstone's time has been so modified by judicial interpretation and legislation that it is scarcely recognizable in the rules of conduct of today which we are pleased to call the Common Law. It is borrowing largely now from the Pandects and Institutes of the Civil Law. For the same reason Code Law is changing. The Constitution of the United States has been stretched on all sides by the Supreme Court to cover the growing body, and the Congress has been busy in sewing on amending strips. Even young Canada would feel itself bound by some restricting clauses of the British North America Act, if it and the Imperial authorities did not quietly ignore them, and all are happy because they know the objectionable clauses can at any time be repealed when Canada requires it, and we are warned against any further written definition of status in the Empire which undoubtedly would embarrass free development. Until Canada has finished growing it cannot be defined. It doth not yet appear what we Canadians shall be. Let our advancing thought and evolving acts as we move toward the beckoning ultimate declare us "Omnis definitio periculosa est."

Laws in Canada and America.

It would be a mistake to assume from what has been said that fundamental laws of all the Canadian Provinces would be the same. They are not. That is why there is in the Constitution of the Canadian Bar Association the clause relating to its objects:—

"Promote the administration of justice and uniformity of legislation throughout Canada so far as is consistent with the preservation of the basis system of law in the respective provinces."

For the basic local laws of eight Provinces differ more widely from those of Quebec than they do from the United States, except perhaps Louisiana.

A SHORT APPEAL TO HISTORY WILL EXPLAIN THE REASON.

The Historian's History of the World says:—

"The stage on which the drama of Canadian History unfolds may seem to the world an obscure one. A closer view, however, will reveal that on this stage some of the gravest problems of history have been pressed to a solution. . . . . Battles were fought on the Rhine, the Elbe, the Danube; German, Austrian, Spanish thrones were shaken to their fall; navies grappled in the Caribbean and Mahratta hordes were slaughtered on the rice fields of India, to decide the struggle which ended only upon the Plains of Abraham. Now in these Imperial domains which Wolfe's triumph secured to British sway, a people is taking shape which bids fair to combine the power and genius of the two great races from which it springs."

As a matter of fact the stage was the northern hemisphere. The drama might be called "The Birth of the British Empire, and the American and Canadian Nations." The time was the middle of the 18th century. The important scene to us was on the Continent. Acts in it had been closed with the treaties of Ryswick 1697, Utrecht 1813, Aix la Chapelle 1748. The latter was only a suspension of hostilities during which both combatants were preparing for another round. Some historians say that in the fight of the British under command of young Washington against the French under Jumonville near where Pittsburg now stands, the shot that killed Jumonville was heard not only throughout the settlements and wilds of America, but in Europe, and started the old French war, the Seven Years' War, or, some call it, the French and Indian War. In that war George Washington capitulated at Fort Necessity to DeVilliers, brother of Jumonville, on the 4th of July, 1754. Then began the British Colonial disaster and defeats at Braddocks Crossing, Lake George, Oswego, Fort William Henry and Ticonderoga. At that time the French held this Continent from the Rockies to the Alleghannies, and from the Gulf of Florida to the North Pole, except the Hudson Bay Company's territory, and seemed likely to realize their hope to drive the British Colonials eastward of the Alleghannies, and if possible into the ocean. In

sequence events followed, out of which arose the British Empire, and which made possible the American and Canadian nations. By reason of the disasters in the war the British people demanded a change of Government, and William Pitt, afterwards Lord Chatham, became Prime Minister, a friend of freedom and a sympathizer with those who contended for it, the greatest War Minister Britain ever had, except perhaps Lloyd George. In 1757 he acceded to settled power and held it till 1761. The glory of those years was due to his genius. He roused the English people to the highest patriotism. He enthused the oversea British as they were never touched from London before or since. He controlled war operations everywhere without interfering in them anywhere. His was the directing mind in the expansion of his country's power, the founder of the British Empire. He supported Clive in gaining for it the Indian Empire, he selected Wolfe to put new France under British rule, which Wolfe did.

Yonder at the City of Quebec stands a monument bearing on the one side the name of Wolfe, the other, of Montcalm, and in the centre this tribute to their just and joint renown:—

"Mortem virtus communem Famam historia Monumentum posteritatis dedit." That event gave this Canadian land to that posterity who dedicated that monument. The same event overthrew the power which pressed upon the thirteen Atlantic British Colonies. and paralysed the arm which hemmed them in. Those Colonies being thus relieved from their enemies the opportunity was given them to move westward, and to turn their attention to domestic politics and consolidate, which they accordingly did with distinguished emphasis.

In his dying hours Montcalm sent this message to the General then in command of the British (General Townsend)

"Monsieur, the humanity of the English sets my mind at peace concerning the fate of the French prisoners and the Canadians. Feel towards them as they have caused me to feel. Do not let them perceive that they have changed masters. Be their protector, as I have been their father."

The action of the British toward the French prisoners and the Canadians was consistent with the appeal of Montcalm to the humanity of the English. The Canadians had at the time of the capitulation of Montreal, September, 1760, their own

usages and laws, and their own method of administering them. French ways were not English ways. The change of Sovereignty and the introduction of new laws naturally caused disquietude which was abated by the Quebec Act 1774, sometimes called the Magna Charta of Canadians of French descent in Quebec. I understand that Mr. Justice Anglin intends referring to this.

That, however, was not the final solution. The Colonies in British North America were advancing vigorously. Those of British and French descent were accommodating themselves to each other. So eventually the British North America Act, the only written part of our Constitution, was passed, by which all laws on subjects within the Federal Jurisdiction are nation wide. So substantially is the public law and the law which relates to commercial and business transactions.

PROVINCIAL JURISDICTIONS.

No doubt as time passes convenience will require, and the preservation of Provincial Jurisdiction demand, greater uniformity in those provincial laws which relate to classes of business carried on between the Provinces. That, undoubtedly, should be left to the free volition of the Provinces. No one Province should be expected to make all the concessions to attain greater unity. The Civil Code system of Quebec relating to purely local and domestic matters differs fundamentally from the system in other Provinces; why should it not, if such be the will of the Quebeckers? It should be the aim of the Canadian people to keep the exercise of provincial rights and privileges free from all kinds of external interferences or encroachment. Citizens will best develop their powers, and make their richest contribution to Canada in the habitat and milieu and the atmosphere to which they are most naturally adapted and the administration of the laws to which they are accustomed. They will usually do what is to their interest, and the more readily if there is no outside power appearing to thereunto compel them. If there is, their sweet reasonableness vanishes.

A minister from another parish, on account of the sudden illness of the resident one, took his place, and was about to begin the service when the beadle presented to him the gown which he said was always worn in that pulpit. Said the minister, Am I compelled to wear it? No, was the reply. Then answered the minister "I will."

The great Creator never made any two things exactly alike, one star differeth from another in their glory, yet even those stars sang together.

So do our Provinces though occasionally some people in them lose the right key or pitch.

I am not suggesting that those from foreign lands should be permitted to continue their alien habits, language and ideals. As they come to benefit themselves by our better advantages, resources, and the protection of our laws, they must in all respects conform to things Canadian, and they should not be admitted more quickly than they can be quietly and effectually assimilated and Canadianized. There is such a thing as bartering a nation's birthright for a mess of pottage.

JULY 1776.

After the failure of the American forces to take Quebec they left Canada with its entire consent, and on the 1st July, 1776, assembled at Crown Point, quite persuaded that Canada would not be a useful 14th State. Three days later, on the 4th July the thirteen issued the Declaration of Independence which had been foreshadowed by Franklin's Colonial Union, signed I think on behalf of seven colonies on the 4th July, 1754.

That Declaration of Independence made clear the separation between the United States and Canada, so far as state sovereignty, independent government and international relations are concerned, not otherwise, for "Like law, like people." Up to that time except as to the original Canadians, the laws in what is now Canada and for them over 100 years in the west of Canada and in remonstrating and demonstrating 13 were the laws of England. From the Rio Grande to the North Pole the people of this Continent were and are the heritors of the same mid-eighteenth century British traditions, customs, history, literature and laws, and of the same British spirit and ideals, the same love of freedom and popular self-government.

It would therefore be far more remarkable if our laws were substantially different than that they should be the same in principle as they are. To each nation its believed history is its Bible. In prejudiced criticism of that Bible of the Nations mentioned some are disposed to cut out the English Genesis and Exodus and Deuteronomy or the book of the original law. Let me use from the Israelitish believed history a simile for the

newer born nations of British beginnings, equally applicable to this continent as to their land of promise.

"Thou hast brought a vine out of England, thou hast cast out the heathen and planted it, Thou preparedst room before it and didst cause it to take deep root and it has filled the land. She sent out her boughs unto the sea and her branches unto the river.

The simile of national houses is suggested by Kipling respecting the young Dominions in the British Empire:—

"Daughter am I in my mother's house
But mistress in my own."

Also suggested by Carlyle in the quotation made at the beginning.

"Laws are not our life, only the house wherein our life is led; nay, they are but the bare walls of the house, all whose essential furniture, the inventions and traditions and daily habits that regulate and support our existence are not the work of Dracos and Hampdens but . . . . . of philosophers, alchymists, prophets, and the long-forgotten train of artists and artisans, who from the first have been jointly teaching us how to think and how to act, how to rule over spiritual and physical nature. . .

In Seman's case Coke said:—

"The house of every one is to him his fortress and castle." those houses, those laws, how wonderful! They uphold, envelop and shelter us. Living within them, we have liberty and are safe. The foundations and chief material of the Canadian and American houses are the English laws. The Canadian has in one part the beauty of a French design. The American has structural variations to suit the country.

In the main they are the same, so are the House of Great Britain, of New Zealand, Australia and South Africa; they belong to the same civilization, the growth and strength of which will continue while those houses stand together.

"While our manners, while our arts,
That mould a nation's soul
Still cling around our hearts,
Between let oceans roll,
Our joint communion breaking with the sun,

Yet still from every beach
The voice of blood shall reach
More audible than speech,
We are one."

REPORT OF COMMITTEE ON THE ADMINISTRATION OF JUSTICE.

Questions remitted for reconsideration:—At the last meeting of the Association there were three subjects remitted for further consideration and report, and your Committee now begs to report upon these as follows:—

1. Should the present right of appeal to the Privy Council be limited to constitutional cases?

The majority of your Committee are of the opinion that the right of appeal to the Privy Council should be maintained without the suggested limitation to constitutional questions. They consider that the Judicial Committee has rendered long and valuable service to the Canadian public and to the legal profession by furnishing a tribunal composed of judges of greater learning, more varied experience and wider vision than can be hoped for under present conditions in Canada. They see a great advantage resulting from the existence of such a final Court of Appeal in which there is more freedom from political, racial or religious bias and from local prepossessions. They observe with regret that the vicious system of making judicial nominations rather as rewards for political services than for the professional qualifications of candidates shows no signs of disappearing from our customs, and they feel that until this danger is removed it would be inadvisable to abolish or restrict the right of appeal.

Finally, the majority of your Committee are impressed with the objection which has frequently been made that the disappearance of this right would have the effect of severing one of the most important ties by which Canada is united to the Empire.

A minority of your Committee, while conscious of the great services which have been rendered to our jurisprudence by the Privy Council, and without thinking that there is any urgent need for restricting the right of appeal, cannot but think that in view of the ever-increasing autonomy of this Dominion, such an institution must be regarded as transitory rather than per-

manent, and that while it is normal in the case of a Crown colony, such an institution seems scarcely compatible with the legitimate evolution of a self-governing Dominion.

It appears to them unreasonable that the legislatures of Canada should be trusted to make laws without any practical restriction on their power of legislation, and that its judges should not be trusted to interpret those laws. Without admitting that impartial decisions cannot be expected from the judges of Canada, or that the system of nominating judges produces this result, they conceive that the proper remedy for these evils is, not to apply for external assistance, but rather to agitate until our governments are impressed with the necessity of making more satisfactory appointments to the Bench. They venture to think that our governments will not feel their full responsibility in this respect until our courts are as supreme in their sphere as our legislatures are in theirs.

Australia has carried the doctrine of autonomy to its legitimate conclusion in obtaining a restriction of the prerogative in regard to appeals to the Privy Council in constitutional cases, and it is noteworthy that the Supreme Court of Australia is regarded as exceptionally strong.

The minority of your Committee would also appeal to the example of Australia as showing that the restriction of this right of appeal cannot be regarded as implying any diminution of the sense of loyalty in a dominion, or as evidence of indifference as to the value of the union.

2. Should the Supreme Court of Canada have its members increased with a view to the strengthening of that Court on the equity side of our jurisprudence, and should that court be composed of an unequal number so as to avoid the occurrence of dismissals by virtue of equal division?

Upon this point your Committee are unanimously of opinion that there is no need of increasing the number of Supreme Court judges for the reasons assigned. For many years the judges in the various courts of Canada have administered both law and equity indiscriminately, and there seems no special need of increasing or strengthening the Supreme Court on the equity side nor does it seem necessary to provide for an increase in the number of judges for the purpose of preventing dismissals resulting from an equal division. This can be avoided

by the judges adopting the rule that only an unequal number of judges shall hold sittings, and the evil, if it be one, would not be removed by adding to their numbers.

There is, however, in the opinion of your Committee something to be said in favour of giving representation on the Supreme Court to the Prairie Provinces, as long, at least, as geographical distinctions are recognized. In view of the diversity of laws and practice in the different provinces, it is perhaps an advantage to have representatives, if not from each province, at least from each group of provinces, so as to assist the court in ascertaining the customs and practice of each particular centre of litigation. In that view the middle west, which furnishes a considerable quantity of litigation pending before the Supreme Court, would certainly be entitled to as much representation as provinces which have hitherto secured representation and which admittedly have fewer cases before that court.

3. Should the rendering of one judgment as the judgment of the Court instead of individual judgments be adopted?

On this question the opinion of your Committee is divided. The majority hold the view that it would be dangerous to suppress dissenting opinions altogether as this would tend to give decisions rendered by a bare majority a fictitious appearance of unanimity and strength which really does not belong to them. So far as the majority of your Committee know this has not been the practice in any of the English and American courts. The instance given of the Privy Council rendering a single judgment without any dissenting opinions cannot be regarded as being in point, because the Privy Council is not, strictly speaking, a court of law, but a Committee which makes a report to the Crown. In the House of Lords, which deals with appeals from the British Isles, all the opinions of the Law Lords are given *in extenso*. Possibly a *via media* might be adopted of having the judgment of the majority delivered by one of the judges, and the opinion of the minority by one of the dissenters. This would certainly be a boon to the profession and would reduce the volume of the reports very considerably. It is submitted, however, that this must be left to the good sense and initiative of the judges themselves, and that the adoption of any hard and fast rule in this regard would be undesirable.

A minority of your Committee, however, believe that a single judgment should be the rule, and in the case of the reports of the Judicial Committee of the Privy Council.

Retirement of Judges. By the Statute of the Dominion 12 & 13 Geo. V, chapter 29, assented to on the 28th of June, 1922, the Judges Act, (R.S.C. 1906, chapter 138) is amended by providing that any judge who is found by the Governor in Council upon a report of the Minister of Justice, to have become, by reason of age or infirmity, incapacitated or disabled from the due execution of his office, shall cease to be paid any further salary if the facts respecting the incapacity or disablement are first made the subject of enquiry and report, and the judge is given reasonable notice of the time and place appointed for the enquiry, and accorded an opportunity by himself or his counsel of being heard and of cross-examination of witnesses and of adducing evidence on his own behalf. Provision is then made for the issuing of a commission of enquiry to one or more judges with the usual powers of summoning witnesses, taking evidence under oath, enforcing attendance, etc.

The Statute then enacts that nevertheless His Majesty shall, by letters patent, grant to any judge so found by the Governor in Council to be incapacitated or disabled by reason of age or infirmity, and who resigns his office, the annuity which he might have received if he had resigned at the time when he ceased to be entitled to receive any further salary, and that nothing in this Act contained shall prevent the Governor in Council from granting to any judge so found to be incapacitated or disabled leave of absence for such period as the Governor in Council, in view of all the circumstances of the case, may consider just or appropriate, and if leave of absence be granted, the salary of the judge shall continue to be paid during the period of leave of absence so granted.

Your Committee regret that it should have been thought necessary to enact such a statute, which must, in their view, tend to lower the high office of the judges in the opinion of the profession and of the public. Such an enactment can only be justified if all other means have failed to secure the retirement of incapacitated or disabled judges, and your Committee venture to express a doubt whether the benefits of the remedy introduced by this staute will not be overborne by the disparaging effect of such legislation upon the judicial office.

LEGAL EDUCATION.

Although this subject has been discussed to such a degree that a learned writer in a recent article seems to suggest that it has been over-discussed, it is hoped that a few further observations may not be amiss. They arise largely out of the ideas that have already been advanced.

Without attempting to speak on behalf of any particular organization it may be said, I think, for such of the members of the profession generally as have evinced any interest in legal education, that their desire is not to be unduly critical of present conditions but rather to consider the possibilities of improvement along certain definite lines. Certainly the personnel of the teaching staff at Osgoode Hall, for example, is not and has never been in question. Indeed our prejudices are apt to be the stronger in favor of the "let-well-enough-alone" policy by reason of the great service which that Law School has rendered to the cause of legal education since its inception. But it is the law of progress that "our little systems have their day" and pass on to make way for even better things.

It is not mine to participate in the somewhat metaphysical discussion of this subject that many of the champions of change are disposed to carry on, but to direct the reader to a few more or less concrete propositions and facts.

Many of the very best jurists in Ontario have been among those lawyers whose entry into the legal profession antedated the existence of the Law School, and it is submitted that on the whole they have been men of higher attainments than those who have followed. Now I desire at this point to parenthetically anticipate the challenge of the protagonist of the Law School by refusing in advance to give a single example of this, firstly, because I do not assume to be competent to sit in judgment on the relative merits of any two of my seniors, secondly, because I do not desire any controversy of a personal nature, and thirdly, because it wouldn't prove anything if I complied. The proposition is merely an opinion and could not be made stronger by the expression of another opinion not necessarily supporting it even if accepted. I do not pretend that there are not some lawyers of the later period who are not only superior to some of the earlier period, but equal to the best. (This leaves plenty of room for all my opponents). I return to the proposition,

because certain important inferences may be drawn from it.

Why is it that such a great proportion of those early pioneers have been distinguished for their brilliancy at the Bar and in all the various branches of the work of the legal profession? Their knowledge of root principles has a sweep that seems utterly lacking in scores of modern practitioners. It is surely unreasonable to ascribe it to the fact that they were set adrift to burrow for themselves as best they might to prepare for the examinations. At any rate to so argue is to suggest that the coming of the Law School had a detrimental rather than a beneficial effect. The answer must be sought elsewhere. Some cognizance should be taken of the fact that many of the present leaders whom the younger members of the Bar are wont to admire for the depth and breadth of their legal knowledge, have lived through a period of much transitional change, and of necessity have much more than a bowing acquaintance for example, with "actions of assumpsit," "trespass on the case," "demurrers," etc., etc., (terms that are like a foreign language to many a young lawyer of 1922), and, (what is of even greater importance) with the wivision between legal and equitable jurisdictions. Allowance must also be made for the fact that with the prevalence of the twentieth century mania for money-making, there has been a tendency, not by any means confined to the legal profession, towards superficiality, and this tendency has been expressed within our ranks in the form of efforts to direct one's studies especially towards that kind of knowledge which best serves in the making of a living, rather than in the cultivation of the mind. And so we have been content to learn the rule without knowing anything of the reason for it. Suffice it that the rule is there and must be followed, "don't ask us why." And a third factor, no doubt, is found in the fact that procedure has been made so loose and flexible (with the high intent that justice and not technique should be paramount) that accuracy of thinking and expression have ceased to be as indispensible as they once were. This aspect is most noticeable, perhaps, in the familiar case of pleadings. Time was when the fate of the cause depended on the pleadings being in proper form, and their preparation required a basic knowledge of the legal principles governing the case. All that is swept away, and pleadings in many cases have the appearance of being the work

of a stenographer,—I mean no disrespect to the stenographer.

Yet all these factors taken together, scarcely tell the whole story. A surprisingly large percentage of the pre-Law-School men were University graduates, or college trained men. They made up for the absence of the Law School by academic training and study that first fitted them to pursue their legal studies logically and thoroughly, and to begin at the sources of things and trace the growth and application of this principle and that, and so acquire a broad groundwork of learning on which to build the work of all the years that followed. It must have taken great qualities of perseverance, steady application and vision to become a lawyer in those days. Then came the law school. It must have appeared at the first as a sort of competitor of the University, as an Institution that would dispense with the practical necessity of a University career to become a lawyer. At any rate, today, a vast percentage of students enrolled at Osgoode Hall have never seen a University except from the outside. No one would pretend that the two years' clerkship which they serve in a law office under modern conditions is equivalent in value to the contribution of a University career. And yet this period of service, plus attendance at lectures for roughly twenty-two hundred hours scattered through a period of three years, and a partial reading of which is prescribed during these lectures, is supposed to change a boy fresh from High School (the entrance standard has very recently is that in the limited time at their disposal, the lecturers must of necessity centre the interest largely on what is strictly and actually present-day law, and give the historical features rather meagre treatment. This, it is submitted, contributes to the superficial spirit of the age, already referred to. And in the eight years since the writer left the law school, the task of the lecturer must have become more and more difficult, for that period has witnessed voluminous legislation on a multitude of subjects which did not trouble us much in 1913, and there seems to be still more to follow.

If there is any moral to be drawn, it is, firstly, that the method of teaching law should be what Professor McKay of McGill University recently described as directing the students to "the sources",—a method doubtless involving more time than the present method of topical treatment according to various

more or less unrelated headings; and, secondly, (and with great deference to opinion to the contrary) whole-time lecturers or professors, and a full time school programme, that would bring the student under the jurisdiction of the staff and the constant influence of association long enough to give him the legal atmosphere of the place and create an esprit de corps that would be conducive of valuable results to student and to school. One cannot forbear to say a word in passing about the contrast in the matter of ethics between the conceptions prevailing today and those of other days. It was not necessary to lay down rules for the guidance of the men of the old school as to what was right or wrong. Yet rules there were, more perfectly conceived in the minds of the members of the profession because they were founded on a great unwritten law of fair and honourable dealings. Logical or illogical as it may be, that which is based in traditions always seems to lawyers and others to be supported by more sacred and effective instances, than new precepts, the latter issuing, as it sometimes seems, out of more or less arbitrary conceptions. It is true that our modern codes of ethics are not new precepts but are only intended as memoranda of those hitherto unwritten rules of conduct by which we have always been governed. But the contents of these same codes are all too new to scores of those whom they are intended to influence, and reach their minds as new-formed and more or less idealistic propositions which it is commendable to adopt if convenient, and not as long established and well recognized rules for common every day application. The traditions of which I have been speaking were once so deep-rooted that it would have been an insult to any lawyer worthy the name to have a code of morals prescribed for the governing of his dealings with his clients and others, and the desire for a written code has only become evident in quite modern times. A quotation from the very instructive and admirable address delivered by the Honourable Chief Justice Mathers on this subject at the Annual Meeting of the Canadian Bar Association in 1920 (See Canadian Bar Association Year Book 1920, at page 271) is timely:—"Suggestions for the adoption of a code or canons of "ethics have not in the past met with much favour either in England "or Canada. There has, however, been for some time a grow-"ing feeling here, stronger in the West perhaps than in the

"East, that the recognized ethical rules which experience has "shewn to be necessary for its government and control, if the "profession of the law is to fulfill its highest destiny, should "be formulated and reproduced in such a way as to be available "to the guidance of the young practitioner instead of leaving "him to discover when too late that he has been *betrayed by* "*ignorance* into taking a false step."

I am not aware that it has ever been suggested that these old standards, which indeed the modern codes simply reiterate, have proved too ideal for practical application. But on the other hand it is well known that they have been lamentably departed from in many, many instances. Is not this departure also traceable to the absence of sufficient common association by the embryo lawyers during the period when, if ever, they must have instilled in them the ideals which we like still to believe the profession cherishes as a whole? Be that as it may the fact can scarcely be seriously controverted that there are young men in the ranks of the profession today who have no more idea of the meaning or place of professional or any other ethics than some of their clients whom they unsuccessfully represent in the Police Courts. Would this situation continue to the same extent if the men who are to man the ranks of the profession went forth from the life of a seminary of equal rank and standing with any of the best Universities in the country into the life of the world, carrying with them a pride in all the traditions that cling to the life of the school? In short, a pride in the school itself and all that it has meant to them as *their* school, instead of a place at which they listened to a few lectures at more or less frequent intervals followed by a hasty leave-taking in order to reach the Registry Office or the Division Court? I venture to state that there are many instances of men who have come through the three years' tuition at Osgoode Hall who, when they graduated, could not give the names of the men who sat four seats away from them in the Lecture Room.

In a paper already too long, space is lacking to develop other ideas perhaps equally important with the above. There is the thought that the general course should be followed by optional courses of a special nature. Many young men today walk out of the law school into the offices of corporations to whose service they devote their whole time and professional skill. These

would welcome such a course, and their number seems to be on the increase. Apart from such cases, many graduates would like to be able to specialize in some particular branch of practice, and any great legal seminary worthy the name, in this day of specialization, ought to afford them facilities for so doing. Indeed, to go a step further, one's training at Osgoode Hall ought to be given with the idea in mind that not only does the student body include those who will go forth to practice law, in the strict and narrow sense, but also many of the future statesmen and law-makers and text writers and teachers. Surely something in the course should contribute in a large measure to better fit them for such posts.

On the whole it is not too dogmatic to say that a change is due. The need is not only apparent but is becoming more and more imperative. The financial problems attending it are not such as cannot be overcome, and this Province which has been in the vanguard, and to which we have been told that some of the other Provinces are looking for high and noble example, must inevitably relinquish its leadership if it stands still, and that right early. No one advocates that what we have should simply be swept away. Our text is evolution, not revolution, but the next step in the process is overdue.

ARTHUR A. MACDONALD.

SIR JOHN BEVERLEY ROBINSON.

A RETROSPECT.

In introducing Lady Astor, M.P., to the Ontario Legislature, the Prime Minister, the Hon. E. C. Drury, said the fact that she had been born in Virginia and was now a law maker at Westminster made it fitting she should speak to a law making body in Canada which owed so much to Virginia, and referred particularly to the great services to the administration of justice rendered by Chief Justice Sir John Beverley Robinson.

A critic, more concerned with unimportant minor details than the "weightier matters of the law," wrote to one of the daily papers that Chief Justice Robinson was not born in Virginia, but in Quebec. He did not, however, point out that his father, Christopher Robinson, one of the first Benchers of the Law Society of Upper Canada, had been born in Virginia. Like many others of the splendid men of that day, he was a

U.E. Loyalist. He was, as stated in Dr. Geo. R. Parkin's preface to the biography of Sir Beverley Robinson written by his son, Major-General C. W. Robinson, C.B., one of "those loyalists who, driven or self-exiled for conscience sake, kindled in Canada that passionate attachment to the idea of a united empire which has controlled the policy of the country for more than a century, is a dominant force in its politics to-day and has contributed, perhaps more than any other single factor, to determine the future of the empire itself."

Sir John, though not the first Chief Justice of Upper Canada, was the first Chief Justice or President of the Court of Error and Appeal. In 1829 he became Chief Justice of Upper Canada. This position he filled for 33 years, until in 1862 he was called to the higher position just above referred to.

In the more important matters Mr. Drury was much more accurate than his critic. It is quite true that the Common Law of England was introduced into Upper Canada in 1792 by the Legislature, but the Courts held that this did not introduce such English laws as were clearly not applicable to the state of things existing in the Province. On this point it will suffice to refer to two cases: *Doe Anderson* v. *Todd* (1846), 2 U.C.R. 82; *Regina* v. *Roblin* (1862), 21 U.C.R. 352.

In both of these cases Chief Justice Robinson gave the judgment of the Court. The record proves that under the statesmanlike guidance of Chief Justice Robinson Upper Canada adopted in this respect a course similar to that taken by Virginia, then a British Dominion, in the seventeenth century and afterwards in the eighteenth century by Nova Scotia, whose Governor recited in an Order in Council of 1721 that he had been directed to make the "Lawes of Virginia" the rule and pattern "where the same are applicable to the present circumstances."

To anyone familiar with the early history of our law it is quite as ludicrous to say, as Mr. Drury's critic does of Chief Justice Robinson, "He had no more to do with 'formulating the common law of this country' than any other Judge," as it would be for an English writer to make a similar statement about Lord Mansfield or Lord Stowell. As to the suggestion that Sir John Beverley Robinson knew nothing of the law of Virginia, it is only necessary to recall that he was an accom-

plished scholar as well as a profound Jurist. For two years he was President of the Canadian Institute, now the Royal Canadian Institute. One of his correspondents was Mr. Conway Robinson, described by his son and biographer, General C. W. Robinson, as a "leading member of the Bar and Chairman of the Executive Committee of the Virginia Historical Society." Sir John visited the famous William and Mary College, of which again, to quote his biographer, "his ancestor, Christopher Robinson, had been a trustee under the original charter of 1693 and where his father had been educated."

Both Christopher Robinson, the father of the Chief Justice, and John Marshall, the most famous of the Chief Justices of the United States, attended William and Mary College in Virginia, and it is probable that they were there at the same time. At all events, it is certain both attended when the celebrated George Wythe was Professor of Law.

Speaking of Marshall's college life, his latest biographer, Beveridge, says: "He had hard work, it appears, to keep his mind on the learned words that fell from the lips of Mr. Wythe." Several times in notes of the law lectures appears the name of Miss Mary Ambler, whom Marshall afterwards married. The conclusion of Beveridge is "the lure of Mary Ambler was greater than that of learning." Perhaps it may also be said of Robinson that the lure of the commission under which he served so gallantly in the Queen's Rangers was greater than that of learning. The Queen's Rangers were commanded by Colonel Simcoe, afterwards Lieutenant-Governor of Upper Canada.

Men, who still live, can testify to the permanent and beneficial effects of the Robinson tradition in the administration of justice in this Province. This tradition certainly embodied all that was best in the traditions of the English Courts and of British Virginia.

Mr. Drury is to be commended for obeying the injunction of Kipling to praise "famous men," and we may repeat the phrase used in his lifetime in regard to certain aspects of the work of Chief Justice Robinson by a political opponent, Mr. Henry Eccles, Q.C., at the time Treasurer of the Law Society of Upper Canada: "No limit need be placed on our praises."

It is well to keep in remembrance those who have by their lives and example raised the standard of national character and ennobled the profession to which they belong. No man has lived in vain if he has fellow men to do the right and spurn the wrong.

We have spoken of the great Chief Justice; in the same connection we would refer to his son, Christopher Robinson, Q.C., who most worthily carried on the traditions of the family. It is not so many years since he was taken from us, but his name will not soon be forgotten. In all high aspirations, devotion to duty, unstained honour, trusted and beloved by all, as was the father so was the son.

Let us conclude with the words of Dr. Parkin in his preface already referred to: "A biography like this brings out in strongest relief the supreme value of character in public as in private life. Personal and family detail may be of limited interest; the broader teaching goes to the root of national welfare. Characters such that of Sir John Beverley Robinson give distinction and dignity to a country's history."

PROBATE DURING LIFETIME OF TESTATOR.

The enterprising editor of a medico-legal journal made a suggestion which he fondly hoped would have been acted on. He says:—

"It is now nearly four years since I suggested in an article in the Medico-Legal Journal (September-October, 1918, issue), that the present practice that a will could only be probated after the death of the testator, should be changed, so as to permit a testator to have his will probated during his lifetime. Not only would this avoid a great many of the difficulties at present encountered in the proving of a will, when some of the subscribing witnesses may have died or disappeared or when they have lost all recollection of ever having witnessed the will, but also could the question as to the testator's soundness of mind and reasons for his disposing of his property be determined, at a time when the testator could prove that he was of disposing mind and memory and that he had good reasons for disposing of his property in the way he did. Any illegality in the will could be determined then and there. The question whether the testator had left too much money to charity,

whether the trusts established by him complied with the provisions of the law; in fact the whole question of the legality of the will could be determined then and there, when the testator is still alive and able to defend his actions. It would in a great many instances prevent the contesting of a will by disgruntled relatives, on the ground that the testator, at the time of the making of the will, was *non compos mentis*, that is to say, not of disposing mind and memory."

It is really very pathetic that no one seems to have taken any notice of the above suggestion; for the writer is evidently in earnest. It is not a joke, and it has manifest attractions for the many half-starving members of our profession. For, if necessary legislation were introduced and the public "caught on," Surrogate business would be booming. Most people do make many wills before they shuffle off, and it would be lovely to have them all probated. We are glad to bring this suggestion before the budding statesmen in our local Legislatures who are on the watch for some subject whereon to draft a bill and so justify their friends in electing them to Parliament.

CRIMINAL RESPONSIBILITY FOR MOTOR ACCIDENTS.

The first statutory enactment in Canada declaring the criminal responsibility of persons in charge of dangerous things was that contained in the Criminal Code of 1892, (Can.), ch. 29, sec. 213. That section was carried into the Criminal Code of 1906 as section 247, and reads as follows:—

"247. Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."

This enactment appears to have been intended to declare the criminal liability already existing at common law. Sir James Fitzjames Stephen in his Digest of the Criminal Law of England states the related proposition based upon the common law as follows:—

"It is the legal duty of every one who does any act which without ordinary precautions is or may be dangerous to human

life, to employ those precautions in doing it." Stephen's Digest of Criminal Law, 6th ed., article 237.

Sec. 247 of the Criminal Code declares criminal responsibility for the consequences of omitting to take reasonable precautions against and to use reasonable care to avoid endangering human life, provided the omission so to do is without "lawful excuse."

Secs. 16 to 68, inclusive, of the Criminal Code, 1906, deal with matters of justification and excuse. By sec. 16 "All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith."

The common law is not abrogated by the Code, and will still be applicable in cases for which no provision has been made in the Code as well to their prosecution and defence. Even in cases provided for by the Code the common law jurisdiction as to crime is still operative except where there is a repugnancy, in which event the Code will prevail. R. v. Cole (1902), 5 Can. Cr. Cas. 330, 3 O.L.R. 389; R. v. Walkem (1908), 14 B.C.R. 1 at p. 7.

Culpable homicide, not amounting to murder, is manslaughter. Cr. Code sec. 262.

And, with certain limitations as to the time of death being within a year and a day of the cause of death (Cr. Code sec. 254), homicide is culpable when it consists (inter alia in the killing of any person by an omission without lawful excuse to perform or observe any legal duty. Cr. Code sec. 252. The legal duty referred to is presumably a duty qua the criminal law which is the subject of the Code and does not refer to such civil rights as are, in general, outside of the legislative jurisdiction of the Dominion Parliament and are delegated to the legislative control of the Provincial Legislatures by the British North America Act, 1867, (Imp.) ch. 3.

The decision in the McCarthy case, supra, affirms in the result the majority opinion of the Saskatchewan Court of Appeal, see R. v. McCarthy (1921), 57 D.L.R. 93, 14 Sask. L.R. 145. It may be taken as establishing that there was no substantial wrong or miscarriage in the direction by the trial court that in a criminal case the degree of negligence which renders a man culpably negligent is greater than in a civil case; but while so affirming the result in the trial court and in the Saskatchewan Court of Appeal, some of the opinions in the

Supreme Court of Canada contain dicta which would support the proposition that there is no such difference between negligence involving criminal responsibility and negligence which results in civil responsibllity at least in the Province of Saskatchewan which was the jurisdiction appeal from. The questions of criminal responsibility becoming enlarged or diminished under Cr. Code sec. 247 because of differences in the various provincial laws dealing with civil negligence was not considered. The reference to "reasonable" precautions in Code sec. 247 gives room for much difference of opinion as to the scope of criminal responsibility and as to how far the question of reasonableness of the precaution or care referred to in Code sec. 247 may, on the one hand, be a question of fact only for the jury and, on the other hand, a question of law for the court.

The development of the Criminal Code of Canada (with the exception of the practice clauses) from the draft English Criminal Code which did not become law in England, tends to show that Code sec. 247 was framed solely with reference to the criminal responsibility under the English common law as applied to crimes, and that it may be treated as a definition of what is sometimes termed "gross negligence" and sometimes "negligence per se" in the criminal courts.

Carelessness is criminal and, within limits, supplies the place of direct criminal intent. Bishop on Criminal Law 313.

In Sir James Fitzjames Stephen's History of the Criminal Law of England (1883) it is said in reference to manslaughter by negligence that the legal and popular meanings of the word are nearly identical as far as the popular meaning goes; but in order that negligence may be culpable "it must be of such a nature that the jury think that a person who caused death by it ought to be punished; in other words it must be of such a nature that the person guilty of it might and ought to have known that neglect in that particular would, or probably might, cause appreciable positive danger to life or health, and whether this was so or not must depend upon the circumstances of each particular case." Vol. 2 Stephen's History of Criminal Law, p. 123.

Although it is manslaughter, where the death was the result of the joint negligence of the prisoner and others, yet it must have been the direct result wholly or in part of the prisoner's negligence, and his neglect must have been wholly or in part the proximate and efficient cause of the death, and it is not so where the negligence of some other persons has intervened

between his act or omission and the fatal result. R. v. Ledger (1824), 2 F. & F. 857.

If a person is driving a cart at an unusually rapid rate, and drives over another and kills him, he is guilty of manslaughter though he called to the deceased to get out of the way, and he might have done so, if he had not been in a state of intoxication. Reg. v. Walker (1862), 1 C. & P. 320.

In the application of the English common law, the prevailing rule is to exclude contributory negligence on the part of the deceased as an excuse in a criminal case. Reg. v. Jones (1870), 11 Cox C.C. 544, disapproving Reg. v. Birchall (1866), 4 F. & F. 1087; Reg. v. Swindall (1846), 2 Cox C.C. 141; Reg. v. Dant (1865), 10 Cox C.C. 102; Reg. v. Hutchinson (1864), 9 Cox C.C. 555.

And in a recent Canadian case it was held that contributory negligence is no defence to the criminal prosecution under Cr. Code secs. 247 and 284, of a light and power company for causing grievous bodily injury by omitting without lawful excuse to take reasonable precautions against endangering human life in the care of the company's electric wires, R. v. Yarmouth Light and Power Co. Ltd. (1920), 56 D.L.R. 1, 53 N.S.R. 152, 34 Can. Cr. Cas. 1, and see annotation to that case, 56 D.L.R. at p. 5.

In cases of homicide the rule is established in many of the United States that one who wantonly or in a reckless or grossly negligent manner does that which results in the death of a human being, is guilty of manslaughter although he did not contemplate such a result. Commonwealth v. Hawkins (1893), 157 Mass. 551, 553, 32 N.E. 862. His gross negligence in exposing another to a personal injury by intentionally doing the act, makes his intention criminal. Commonwealth v. Hawkins, supra; Banks v. Braman (1905), 188 Mass. 367, 74 N.E. 594.

Criminal negligence is sometimes referred to as negligence per se. Such negligence has been defined as "the omission to do what the law requires or the failure to do anything in the manner required by law." Babbitt's Law of Motor Vehicles, 2nd ed., sec. 954; St. Louis, etc., Ry. v. Keokuk (1887), 31 Fed. Rep. 755 at p. 756.

"Negligence per se" has been described as an act or omission which the law has commanded or prohibited, the occurrence of which is, of itself and independent of its result, as matter of law declared a failure of duty rendering the culprit liable to

public punishment, and this irrespective of all questions of the exercise of prudence, diligence, care or skill in case a fellow being is injured. Thompson Commentaries on Negligence, 2nd ed. sec. 10, 204; Babbitt's Law of Motor Vehicles (1917), 2nd ed., sec. 955; Cecchi v. Lindsay (1910), 1 Boyce 185 (Del.), 75 Atl. 376; Robinson v. Simpson (1889), 8 Houst. 398 (Del.), 32 Atl. 287.

"When the imperfection in the discharge of duty is so great as to make it improbable that it was the result of mere inadvertence, then in proportion to such improbability does the probability of negligent injury diminish and that of malicious injury increase." Wharton on Negligence, 2nd ed., sec. 22.

If one is grossly and wantonly reckless in exposing others to danger, the law holds him to have intended the natural consequences of his act, and treats him as guilty of a wilful and intentional wrong. It is no defence to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury, there is a constructive intention as to the consequences which, entering into the wilful intentional act, the law imputes to the offender and in this way a charge which would be mere negligence becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. Banks v. Braman, 188 Mass. 367, 74 N.E. 594. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognised as an elementary principle in criminal law. Banks v. Braman, supra; and see Commonwealth v. Pierce (1884), 138 Mass. 165; Commonwealh v. Hartwell (1880), 128 Mass. 415; Bjornquist v. Boston & Albany Railroad (1904), 185 Mass. 130, at p. 134.

If the operator of a motor vehicle, with reckless disregard for the safety of others, so negligently drives his vehicle in a public highway as to cause the death of a person thereon, he is guilty of criminal homicide. Davids' Law of Motor Vehicles (U.S.A. 1911), sec. 237; State v. Goetz (1910), 83 Conn. 437, 76 Atl. 1000; State v. Campbell (1910), 82 Conn. 671 at p. 677, 74 Atl. 927, 135 Am. State Rep. 293.

Individuals as well as corporations, in the use and operation of dangerous machines, should have a due regard to the preservation of the rights of the public in the use of the public streets, as well as the protection of persons using such streets from in

jury; and if they fail in this and should in the operation of a vehicle which is always attended with more or less danger negligently, carelessly and recklessly destroy human life, it is but in keeping with the proper and impartial administration of justice, that penalties should be suffered for the commission of such acts. State v. Watson (1909), 216 Mo. 420, 115 S.W. Rep. 1011, at p. 1015.

W. J. TREMEEAR.

CRIMINAL RESPONSIBILITIES OF MEDICAL MEN.

In an article which appears on another page the criminal responsibility for negligence in motor car cases is discussed. The general principle laid down by the Supreme Court of Canada in the case there referred to (*McCarthy* v. *The King*, 61 D.L.R. 170) is that a person driving an automobile on a public street is under a legal duty to use reasonable care and diligence to avoid endangering human life. If he fails to perform that duty without lawful excuse he is criminally responsible for the consequences. This is a proposition of the common law as well as one in our Criminal Code. It is of general application to "anything whatever, whether animate or inanimate."

In the case above referred to it was a motor car; but the same rule would apply to an infinite number of other articles endangering life. It is to one of these we would draw attention for the purpose of warning a class who are too apt to imagine that they are immune from liability of that character. We refer to medical practitioners.

It is commonly reported that on several occasions surgeons have carelessly left in abdominal wounds, necessary for some operation, an instrument, or part of one, which was used in the operation. In other cases it has been thought necessary by the physician to apply heat, using a hot water bag. These have, not infrequently, been applied to the body of the patient without proper covering, resulting in some cases in such a serious scald or burn as to endanger life and which has given intense pain and impaired a limb for life. In one case a scalding hot water bag was carelessly applied or permitted to be applied to a patient's feet, with the result that she is said to be a cripple for life. In other cases these applications have

been such that if placed carelessly on a vital spot, whilst the patient was unconscious, they would have caused death.

It is rather surprising that at present we are not aware of any prosecution for criminal carelessness of this character. Doctors can be thankful that the public are averse to prosecuting offenders of a class so generally kind and considerate; but they are not immune. Certain it is that if an unfortunate nurse were thus careless she would be instantly dismissed and her diploma cancelled. This has been done to them; why not to those who ought to be even more careful? In some hospitals no such application is permitted until its heat is tested by a thermometer. Cases of gross carelessness in this respect are much more common than people are aware. Perhaps it would be desirable to make an example of some of these "kind and considerate" people who sometimes are more hurtful than helpful.

Review of Current English Cases.

By Cecil Carrick, Barrister-at-Law.

Bailor and bailee — Motor car deposited for sale — "Customer's sale risk"—Negligence of bailee's servant.

Rutter v. *Palmer,* 1922, 2 K.B. 87 (Court of Appeal). The owner of a motor car deposited it for sale on commission with the keeper of a garage upon the terms of a printed document, containing the clause, "Customer's cars are driven by your staff at customer's sole risk." The garage keeper sent the car out in charge of one of his drivers to show it to a prospective purchaser. It was damaged owing to the negligence of the driver. In an action for damages by the owner of the car against the garage keeper, the defendant set up the above clause.

Held, that if an ordinary bailee uses words applicable to the act of his servants, inasmuch as he is not liable for their acts, unless negligent, the words will generally cover negligent acts, although such acts are not speciall mentioned, because otherwise the words would have no effect. Although a common carrier, being liable for the acts of his servants, whether negligent or not, in order to protect himself from responsibility for all their acts, must use words which will include negligent acts, the priciple of the carrier's cases does not apply to bailees of this class.

Trial by jury—Delivery of verdict in hearing of some only of the jury—Affidavit by juror—New trial.

Ellis v. *Deheer,* 1922, 2 K.B. 113 (Court of Appeal). A jury, upon returning from the jury room to the Court, found the jury box occupied by a jury trying another case. Only the foreman and two or three of the jury were able to get into the body of the Court. The rest of the jury remained outside the body of the Court. The verdict was delivered and judgment entered. Upon a subsequent day, three jurors made affidavits that they did not hear what the foreman said, and that he did not deliver the true verdict of the jury. Upon an application for a new trial, it was held that although affidavits will not be received from jurymen as to the discussion which they may have had between themselves when considering their verdict, or as to the reasons for their decision, yet the affidavits filed in this case should be admitted because they dealt with something that happened after the return of the jury to Court. A new trial was ordered.

Settlement—Construction—Second marriage of wife—Ultimate trust for wife's statutory next of kin had she died intestate and "without having been married"—Claim of child of former marriage.

Boyce (appellant) *and Wasbrough and others* (respondents) (1922), 1 A.C. 425 (House of Lords). A wife, who had obtained a divorce from her first husband, by whom she had one son, by a settlement made in contemplation of a second marriage, settled a fund, upon the death of the survivor of herself and the intended husband, upon trusts for the issue of the intended marriage, and if there should be no child who should become entitled thereunder, a general power of appointment over the fund was reserved to her. In default of appointment the fund was to be held, in the event of her predeceasing her husband, in trust for such person or persons as under the Statutes of Distribution would have become entitled thereto at her death, had she died possessed thereof intestate, and "without having been married." There was no issue of the second marriage, and the wife predeceased her husband without having exercised her power of appointment. On the death of the husband the question arose whether the son by the former marriage was entitled to the fund as next of kin. It was held (Lord Buckmaster and Lord Parmoor dissenting) that the son was ex-

cluded, there being nothing in the context or the circumstances to modify the natural meaning of the words "without having been married." These words are general and apply to any marriage, (per Viscount Birkenhead.) While in litigation of this class it has been held that a plaintiff, being defeated in the Court, must support the expenses of the appeal, yet there is an exception where in the appellate Courts the appeal discloses a difference of judicial opinion so clear and persistent as to make it plain that there was an important and debatable legal issue. In such case the costs should be paid out of the estate.

Landlord and tenant—Agreement by landlord to keep sea wall in repair — Action for damages for breach of agreement — Implied condition of notice of want of repair.

Murphy and others (appellants) *and Hurly* (respondent) (1922), 1 A.C. 369 (House of Lords). This was an appeal from the Court of Appeal in Ireland. The appellants were judicial tenants of the respondent. The rent payable by them to the landlord was fixed by the Irish Land Commission on the basis that as a condition of the tenancy in each case the landlord should keep in repair a certain sea wall. This sea wall was damaged by heavy weather and as a result the crops and holdings of the tenants were injured. They thereupon claimed damages for breach of the covenant to keep the wall in repair. Held, that it was not necessary to show that the landlord had notice of want of repair. The principle upon which notice is required to be given to a lessor requiring him to repair demised premises in acocrdance with his covenant before proceedings are taken to obtain damages for the breach is not inherent in the relationship between landlord and tenant. The doctrine depends upon the consideration whether the circumstances are such that knowledge of what may be required to be done to comply with the covenant cannot reasonably be supposed to be possessed by the one party while it is by the other. Such may be the case where the tenant has special knowledge springing from his occupancy of the premises, and where the landlord is in a state of ignorance arising from the absence of such occupancy. There was no such implication in this case.

Vendor and purchaser—Open contract for sale of land—Public right of way—Latent defect.

Yandle and Sons v. *Sutton; Young* v. *Same,* 1922, 2 Ch. 199; Sargant, J. The defendant in these actions agreed with the

plaintiffs to buy certain lands. Both agreements were open contracts. He refused to complete the contracts on the ground that there was a public right of way across both parcels of land. The plaintiffs sued for specific performance. The track being an unmetalled open track, of a nature compatible with the existence of either a right of way or of a mere accommodation track for the use of the persons entitled to the land, it was not a necessary indication of a right of way. In order to be a patent defect the defect must either be visible to the eye, or arise by necessary implication from something visible to the eye. The actions were dismissed.

Negligence—Wall adjoining highway—Defective condition —Injury to child in yard adjoining highway — Non-liability of owner of wall.

Bromby v. *Mercer,* 1922, 2 K.B. 126 (Court of Appeal). The plaintiff, an infant, was playing in the yard of premises owned by the defendant. These premises were let by the defendant to a tenant, whom the infant was visiting. They were separated from a highway by a stone wall. The defendants were liable under the tenancy to keep the outside of the premises in good repair.

The plaintiff, while in the yard, placed her hand upon the wall, whereupon a flagstone fell upon her, causing serious injuries. At the trial, the plaintiff was given judgment, on the ground that, although the defendants were not liable to her for negligence, because they owed no duty to her, yet they were liable in damages for permitting the wall to be in so dangerous a condition as to constitute a public nuisance to persons using the highway. On appeal, it was held that inasmuch as the plaintiff was never upon the highway at all, no right of hers was infringed, so far as the use of the highway was concerned. She could not recover damages for injury caused by a public nuisance, because she was not at the time exercising any public right. Apart from this, she had no right, either in contract or tort, because the defendants, not being occupiers, owed no duty to any person coming on to the premises.

Bankruptcy—Gaming Act—Bets paid by cheque—Action by trustee to recover.

Scranton's Trustee v. *Pearse,* 1922, 2 Ch. 87 (Court of Appeal). The debtor paid the defendant, a bookmaker, cheques

for bets lost on horse racing, and subsequently was adjudicated a bankrupt. His trustee in bankruptcy sued for the amount of the cheques. The defendant contended that such an action was practically dishonest,, and should not be brought by an officer of the Court. It was held by Astbury, J., that all proceedings should be stayed on this ground. On appeal, however, it was held that where a right of action was vested in a trustee in bankruptcy in respect of a statutory debt, the Court was not entitled to say that it was dishonourable for him to enforce it, and judgment was given for the plaintiff.

Power of appointment—Exercise to obtain personal advantage—Freedom to re-marry—Fraud on power.

Cochrane v. *Cochrane,* 1922, 2 Ch. 230; Sargant, J. A husband, being anxious to have a decree *nisi* made absolute in order that he might re-marry, agreed, at the request of his wife, to appoint in favor of the only child of the marriage more than half of a fund of £50,000, over which he was the donee of a special power of appointment amongst his children or remoter issue. There being issue by his second marriage, he purported to appoint anew in favor of all his children. A declaration was sought that the latter appointment was invalid. It was held that the first appointment was a fraud on the power, in that it was made by him in order to obtain a personal benefit for himself, namely, freedom to re-marry.

Constitutional law—Acquisition of land—Contract by minister—Necessity for Order in Council.

Mackay (appellant) *and Attorney-General for British Columbia and others* (respondents), 1922, 1 A.C. 457 (Privy Council). By section 3 of the Public Works Act (R.S.B.C. 1911, c. 189, as amended in 1914) the Lieutenant-Governor in Council may acquire, in the name of His Majesty, lands for certain public purposes. By s. 37, the Minister, in this case the Minister of Public Works, has power to enter into any contract required for carrying out the provisions of the Act, but no such contract is to be binding on him unless signed by him and sealed with the seal of his Department. Certain lands in the City of Vancouver were alleged to have been sold by the appellant to the Sovereign at a price to be determined by arbitration. An award was made. The Government of the Province changed before the purchase price so determined was paid. The new ministers

refused to advise that the agreement be carried out, on the ground that there was no evidence that its execution had been authorised by the Lieutenant-Governor in Council, or that it was sealed with the seal of the Department of Works. It was held that as the constitution of British Columbia follows the type of responsible government in the British Empire, it requires that the Sovereign or his representatives should act on the advice of Ministers responsible to Parliament, that is to say, they should not act individually but constitutionally. A contract which involves the provision of funds by Parliament requires that Parliament should have authorised it, either directly or under the provisions of a statute. In this case no contract could have been made unless sec. 3 authorised it. No order-in-council having been passed, the case was ended, without it being necessary to enter upon the point made as to the seal.

Lawyers' Lyrics.

THE STUDENT'S DREAM.

By the late E. Douglas Armour, K.C.

I sat alone, with Benjamin on Sales upon my knee;
The letters danced before me and the words I couldn't see;
I'd attended many a lecture, and had taken many a note,
But I couldn't see a grain of sense in anything I wrote.

I was reading for my Call exam., immersed in deepest gloom,
Oppressed with nervous doubt and dread of what might be my doom;
I was overcharged with Equity, and Common Law and Torts,
And altogether I was feeling greatly out of sorts.

The books were piled around me in a litter on the floor;
There were Marsh's "Court of Chancery," and perhaps a dozen more,
A wretched book on Titles, and another one on Wills,
De Colyar, Pollock, Leake and Best, and poor old Byles on Bills.

And now a mist seemed gathering about me in the room,
And through it all the books in curious forms began to loom;
They perched in turn upon my knee, and flapped their leaves and fluttered,
And whirled in circles round my head, and aminously muttered.

They pulled my hair and boxed my ears and bumped against
my nose,
And then they settled on the floor in front of me in rows.
And Blackstone hobbled forward with a question to propound—
"What is the rule in Shelley's case, and where can it be found?"

This seemed to be the signal for the ill-conditioned rabble,
For they poured forth questions right and left as fast as they
could gabble.
"Does dower attach on land alone? If so, pray answer how
A man can say, 'With all my worldly goods I thee endow'?"

"State reasons for all answers, and especially the next,
And where the lectures differ from your reading of the text."
"If A. kick B., and B. kick C., who, driven by distraction,
In turn kicks A., is this what's called circuity of action?"

"If A. sues C. for damages, can C., if he's a mind,
Buy up the kick B. got from A. and pay A. off in kind?
Or, if it's not assignable, can C. set up the plea
That, though he gave the kick to A., 'twas to the use of B.?"

"If either course you should adopt, will counter-claiming do,
Or does the law of set-off apply to a set-to?
In case you should not think so, but advise that C. sue A.,
Explain, as nearly as you can, what you would make C. pay?"

"Suppose your neighbour dines with you and guzzles too much
port,
Are you, as neighbour, bound to give him lateral support?"
"If B. sues A., for that A. merely shook his fist at B.,
Is *falsa demonstratio non nocet* a good plea?"

"How is it that the ancient forms of writ did outlive us?
For instance, writ of entry *sur disseisin in the quibus?*"
"Is a double possibility your chance of getting through?"
"And, can you sue in trover for conversion of a Jew?"

"If attendance at the lectures is considered, as a rule,
To be equally important for the students and the school,
Then why should not the Benchers make arrangements to have
cabs sent
For those who are habitually late, or who are absent?"

At last, I got so angry at this senseless sort of joke
That I aimed a kick—and nearly tumbled off my chair—and woke.
The fire was out, the lamp was low, and I was cold and weary;
The room seemed full of calf-bound ghosts that made me feel quite eerie.

I let the books lie where they were and stumbled off to bed,
But, before I pressed the pillow with my throbbing, aching head,
I consulted a decanter which I keep upon my table,
With "sumedum bis in die atque noctu" on the label.

CANADA, OUR CANADA!

The following suggested as a new National Anthem for Canada, was written by Mr. Archer Martin, son of Hon. Mr. Justice Martin, of British Columbia:

1. Hail! stately country of our sires!
To Thee we light the altar fires,
Ne'er to be quenched till life expires,
Canada, our Canada!

Chorus—Canada, we hail Thee!
Whoever may assail Thee,
Never shall we fail Thee,
Canada, our Canada!

2. Each true son's heart glows with the flame
Of patriot pride to see Thy name
Writ large upon the roll of fame,
Canada, our Canada!

3. From East to *St. Elias' towers,
The cry comes through th' awakened hours—
"Arise, assert Thy manhood's powers,
Canada, our Canada!

4. "The time has come to take Thy place,
"Among the nations, face to face,
"Equal at last with ev'ry race,"
Canada, our Canada!

ARCHER MARTIN.

Victoria, B.C., July 1st, 1922.

* Mt. St. Elias (18,024 feet) overlooking the Pacific and forming the S.W. corner boundary between the Yukon and Alaska.

Correspondence.

CONVEYANCES "IN TRUST"

Editor, Canada Law Journal,

Dear Sir:—

Referring to my article in your issue of February last, relative to the case of Re McKinley and McCullough, 51, D.L.R. 659, and 46, O.L.R. 535, decided by our Court of Appeal, which deals with the question of Conveyances to Grantees "in trust", I think it is worth while calling attention to the case (decided by the Privy Council) of Bank of Montreal v. Sweeney, A.C. (1887) 617 which held that in the case of a transfer of shares by a holder to whom they have been assigned "in trust", a transferee from such holder is bound to inquire whether the transfer is authorised by the nature of the trust.

Lord Halsbury, L.C. :—in his judgment says:—

"The bank had express notice that, as regards the property transferred to them, Rose stood to some person in the relation expressed by the words "in trust", and the only question is what duty was cast upon the bank by that knowledge. Their Lordships think it wrong to say that any less duty was cast upon them than the duty of declining to take the property until they had ascertained that Rose's transfer was authorised by the nature of his trust. In fact they made no inquiry at all about the matter, following, as Mr. Buchanan says, the usual practice. So acting, they took the chance of finding that there was somebody with a prior title to demand a transfer from Rose, and as the plaintiff is such a person they cannot retain the shares against her claim."

"Then it was argued that the words "in trust" do not show a title in any other person, and that they might be merely a mode of distinguishing one account from another in the Company's books. Their Lordships think that they do import an interest in some other person, though not in any specified person. But whatever they mean, they clearly show the infirmity or insufficiency of Rose's title: and those who choose to rely on such a title cannot complain when the true owner comes forward to claim his own.

It seems curious that this case was apparently not referred to when the matter was before the Court of Appeal.

Yours truly,

London, Ont. F. P. Betts.

Nov., 1922.

Book Reviews

The Canadian Railway Act, 1919. Third Edition by Angus MacMurchy, K.C. and John D. Spence, Barristers at Law. pp. LVII 789, Toronto, 1922, Canada Law Book Company, Limited.

The second edition of the above work, which was published in 1911, had 80 pages more text and over 400 more decisions than the first edition which appeared in 1905. About 3000 cases are cited in the third edition. The first 57 pages of the book are taken up with a comparative statement of the section numbers of The Railway Act, 1919, and amending Acts and the preceding Act, as well as with citations of cases. There are 754 pages of text. Readiness of reference is provided for by an index of 43 pages.

The present edition has about 100 pages more of text and annotations than the second edition. At the same time, there has been a cutting down in bulk by omitting the Lord's Day Act, the Schedule of Forms and requirements respecting plans, the Regulations of the Board, etc., and by adoption of abbreviations in citations wherever possible.

The setting out of the decisions in black-faced type in the present edition is an aid to the eye in running down the authorities cited.

The text is copiously annotated. Of the total printed text, approximately 60% of the space is taken up with annotations. Without attempting to enumerate in detail and simply by way of illustration, it may be noted that of 135 pages of text covering Sections 312 to 359 of the Railway Act—the portion peculiarly concerned with freight and passenger tolls—117 are taken up with annotations. The information, especially in the section dealing with tariffs and tolls, is rich in citations from decisions of the United States courts and regulative tribunals.

The Editors, in this connection, acknowledge their indebtedness to the Chief Counsel and the Assistant Counsel of the Interstate Commerce Commission. While these decisions are informative and in various instances indicate the road, at the same time it is recognized that only when the circumstances in Canada are on all fours with those in the United States can the decisions based on the latter be regarded as applicable in their entirety in Canada. *Manitoba Dairymen's Assn. vs. Dominion and Canadian Express Cos.*, 14 C.R.C. 142, p. 148.

The Railway Act has developed by accretion and has in form a lack of logic which appertains to such a method of development. It is a code setting out the conditions which, in the absence of express legislation, are to be read with the terms of the Special Act. It sets out the powers of the railway not only as to the fundamental matter of compulsory taking of land, but also as to the powers in connection with construction and operation. Then, in addition, there is super-imposed an extensive regulative jurisdiction extending from the approval of a route map to the sections dealing with tolls.

The regulative portions, so far as tolls are concerned, deal primarily with railway tolls. There has not, however, been a development on any rigid logical method. By successive enactments, regulative jurisdiction has been conferred in regard to Express Telegraph and Telephone tolls. While, in respect of railway services, there is jurisdiction not only over facilities but also over tolls, the jurisdiction in respect of services set out in the preceding section is a toll jurisdiction alone.

The same lack of thorough-going logical organization is apparent when the terms of particular sections are considered. Section 375, subsection 12, dealing with Telephones provides that "The jurisdiction and powers of the Board and in so far as reasonably applicable and not inconsistent with this section or the Special Act, the provisions of this Act respecting such jurisdiction and powers .. .. shall extend and apply to all companies as in this section defined." Such a delegation of law-making power to a tribunal with mingled judicial and administrative functions would give pause to a United States' commentator. In dealing with this situation, Parliament has shown that the same laws do not apply to it as to nature. *Natura non facit saltum.*

Not only those who desire to deal with the Railway Law of Canada from a technical standpoint but also those who desire from an informational standpoint to obtain an acquaintance with the evolution of Canadian law in regard to railways will find in the text a clear and compendious treatment applying wherever possible the scientific canons of the comparative method. In sum, it is an excellent and convenient work of reference.

S. J. MCLEAN.

Bench and Bar.

THE HON. MR. JUSTICE PIERCE BUTLER.

United States Supreme Court.

It was our intention to congratulate the Hon. Mr. Justice Pierce Butler on his recent appointment to the Bench of the highest Court in the Republic of the United States, but when we survey the history of this gentleman, we refrain from so doing, but instead we congratulate the United States and Mr. President Harding in the selection of a man of such attainments and ability.

Mr. Justice Butler is first a gentleman. The second requirement for a Judge is that he should if possible know a little law. We ask our readers to examine the record of Mr. Justice Butler as a jurist and at once it will be made known that he is at the top of his profession, of a lucid mind, with a broad expanse of the principles of law from a life study, for legal attainments do not come as "a birthday present."

Mr. Justice Butler has taken part in some of the great matters of judication in Canada, and we almost claim him as one of our own, and we are proud of him.

OBITUARY

E. Douglas Armour, K.C.

This eminent lawyer, well known as such not only in the Province of Ontario, but also throughout Canada, passed off the scene at his residence in Toronto on October 3rd, at the age of 71.

A native born Canadian, he was educated at Trinity College School, Weston, and matriculated at Trinity University, Toronto, from which he subsequently received the degree of D.C.L. Called to the Bar in 1876, he was appointed Queen's Counsel in 1890. For 29 years he was a lecturer in the Ontario Law School on Real Property and Constitutional Law. The first editor of *The Canadian Law Times*, he so remained for some nineteen years. He was a Bencher of the Law Society of Upper Canada for 11 years and was chairman of the Legal Education Committee. Latterly he was consulting editor of the Dominion Law Reports.

A student in all branches of the law, his speciality was that of Real Property. He occupied, in his day and generation, the same unique position which in former days was held by Alexander Leith, whose books on real property are still among the classics of our profession. Happily for us Mr. Armour's ability and learning were equalled by his industry, as a list of his works amply testifies. Among those most familiar to our readers are his works on the law of Titles, of Real Property, and of the Devolution of Estates. He was also that author of Law Lyrics, being verses on legal subjects. In the Canadian edition of Theobald on Wills, Mr. Armour added the Canadian cases. His writings have greatly enriched the law libraries of Canada, and they are not unknown in other parts of the Empire.

Of Mr. Armour it can be well said that a versatile lawyer, a learned counsel and a distinguished citizen has passed beyond.

OSGOODE HALL LIBRARIAN.

It is a source of great satisfaction to the profession at large and especially of Toronto, that the Law Society of Upper Canada has seen fit to appoint Mr. J. J. Daley to the position of Chief Librarian at Osgoode Hall.

Mr. Daley was appointed to the position of Assistant Librarian in 1885, and since that time by his thoughtful and courteous attention to his duties has won a host of friends not only among the members of the profession but with all with whom he has come in contact.

It is the general feeling among the profession that Mr. Daley's long connection with the Library and his intimate knowledge of its vast contents eminently qualify him for this position; that the Law Society was well advised in making the appointment, and, that under his able guidance the usefulness and advantages of the Library will be developed to the fullest extent.

Flotsam and Jetsam.

The commercial atmosphere of the 20th century is also affecting honorary titles in England, for we are told that knighthoods and baronetcies have been on sale there cheap for cash "to the right kind of politicians". This is perhaps a harmless phase of trade and commerce, provocative only of the con-

temptuous mirth of those not as yet to a proper sense of decency. But there are safe matters at home that we might attend to before criticising outsiders.

We impute no wrong motive whatever to the lavish bestowal in this Dominion of the title of K.C.: but it has so cheapened what ought to be an honourable professional distinction that it is not now coveted for that reason; the lists are too often criticised with a smile by those who would, in these days, rather refuse than accept the intended compliment. We do not in these remarks criticize the names but object to the number of them.

Whilst the matters above referred to are comparatively of minor importance, we cannot refrain from again, and for the last time, referring to something else of a cognate nature, i. e., the selection of suitable men for the Bench. This is of vital importance to the country, and of continuous interest to the profession.

We have now a Bar Association which has attained a position entitling and enabling it to exert a powerful influence for good in relation to judicial appointments. It has, moreover, a duty in that respect which we trust it will perform. We are aware of the difficulty every government has in inducing the best men to go on the Bench. An effort should be made however, to overcome this difficulty; but certainly this is no excuse for the appointment, as has too often been the case, of political friends no longer useful to the Party; or whose seat in the Cabinet is wanted for some one else. How refreshing it has been to see, though most infrequently, the appointment of some eminent lawyer hailing from the opposition side of the house! Why not? Party politics, never too savoury, are odious when they invade the sacred precincts of the Bench.

The Sheet Almanac which has for so many years been published in connection with this Journal will be continued and sent to the readers of our successor *The Canadian Law Review*, the first number of which will be issued early in the new year.

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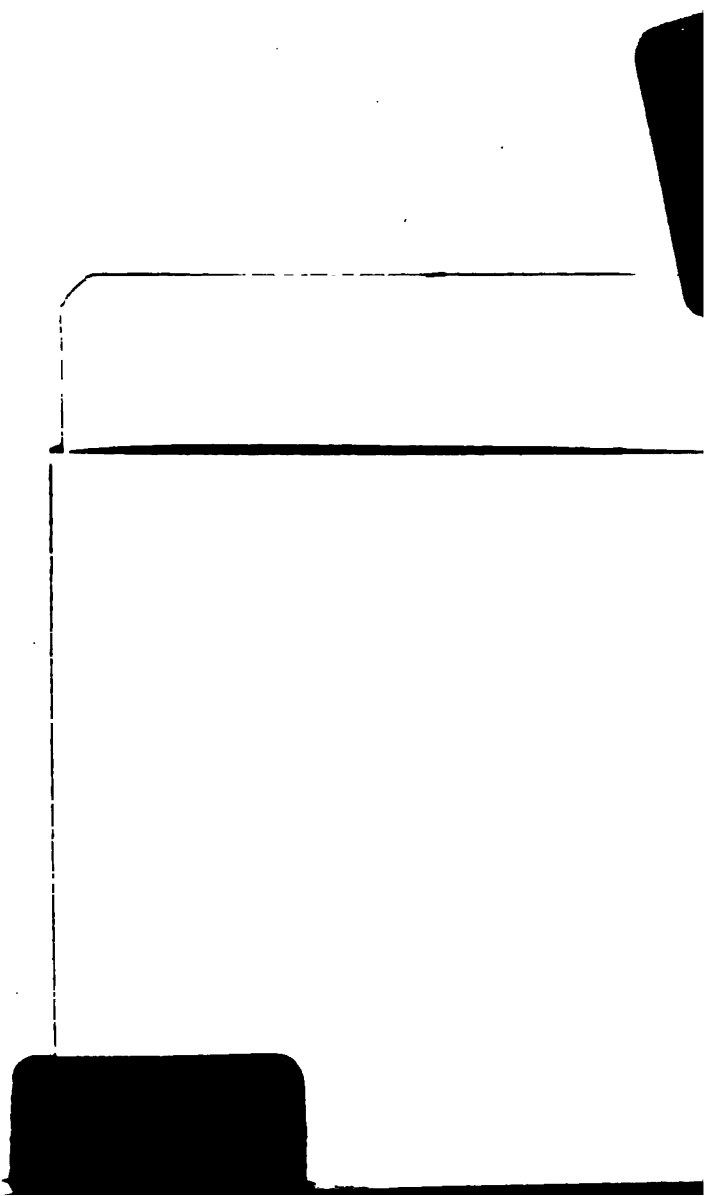
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